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CIS

EXTRADITION ACT OF 1981

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1639

OCTOBER 14, 1981

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EXTRADITION ACT OF 1981

WEDNESDAY, OCTOBER 14, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:28 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Grassley, and DeConcini.

Staff present: Vinton DeVane Lide, chief counsel; Quentin Crommelin, Jr., staff director; and Paul Summit, counsel.

The CHAIRMAN. Today the Senate Committee on the Judiciary is conducting a hearing on S. 1639—the Extradition Act of 1981. We have been privileged to have the encouragement and cooperation of the Departments of State and Justice in undertaking to reform and modernize the extradition laws of the United States. Indeed, most of the provisions in current law were enacted well over a century ago and depend on court decisions to fill major gaps in the law.

Some of the principal changes proposed by the bill would:

Require the Attorney General to serve as complainant in extradition matters, thereby eliminating the possiblity of a foreign government—or someone acting for a foreign government—instituting unjustified extradition proceedings.

Permit an arrest warrant to be issued when the location of the fugitive is not known, thereby facilitating law enforcement efforts in locating international fugitives.

Permit extradition proceedings to be commenced by means of a summons rather than an arrest warrant where the fugitive's location is known and flight is unlikely.

Set standards and conditions for the release of the alleged fugitive in any stage of the proceeding, not just prior to the extradition hearing.

Place responsibility for deciding whether extradition is sought for a "political offense" in the hands of the Secretary of State, thereby permitting this determination to be made in the same manner as asylum applications.

Permit fugitives to be temporarily extradited to the United States for trial or sentencing.

Authorize the Attorney General to make all arrangements to take custody of fugitives found extraditable to the United States by foreign countries.

These are some of the major points which I anticipate the witnesses today will comment upon as they share their views with this committee.

It is my hope that these hearings will enable us to develop a reasonable and efficient extradition system.

Our witnesses today are Daniel McGovern, Deputy Legal Advisory, Department of State; Michael Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice; Prof. M. Cherif Bassiouni, School of Law, DePaul University, Chicago, Ill.; and William M. Hannay, attorney at law, Chicago, Ill.

Do you all wish to come up at one time or do you wish to take Mr. McGovern and Mr. Abbell first?

Mr. **ABBELL**. That would be preferable.

The **CHAIRMAN**. You gentlemen may proceed.

STATEMENT OF DANIEL McGOVERN, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. **McGOVERN**. Mr. Chairman and members of the committee, I appreciate this opportunity to appear before you to express the Department of State's position on S. 1639—the proposed Extradition Act of 1981.

In my prepared testimony today I will confine myself to a discussion of the three provisions of the bill which the Secretary of State singled out for comment in his letter to Chairman Thurmond endorsing the proposed legislation. In that letter, dated August 25, 1981, Secretary Haig stated:

> The Department of State is particularly pleased with the provisions of the bill which provide more effective Federal control over filing of extradition requests in this country (section 3192); which for the first time permit appeal from a district court's decision on an extradition request (section 3195); and which place in the Secretary of State the determination whether extradition should be refused on political offense grounds (section 3196(a)(3)). Taken together, these provisions should reduce the risk of adverse foreign policy consequences which flow from extradition either improperly initiated or improperly refused. At the same time, every effort has been made to preserve the protection of individual rights.

In discussing these three provisions I will draw extensively upon the detailed legal memorandum submitted in support of S. 1639 and printed with it in the Congressional Record.

I will first address section 3192, which specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government. The present statutory scheme does not specify who may file complaints in extradition matters.

The rule developed by the courts appears to be that anyone acting under the authority of the demanding government may file a complaint for extradition. Thus, extradition cases have been instituted by diplomatic or consular representatives, foreign police officers, and even private citizens who claim to be acting on behalf of a foreign government. This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government.

However, in recent years, the Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested State to provide assistance to the government seeking extradition, or pursuant to an informal international agreement for reciprocal legal representation.

Section 3192 completes and codifies this desirable trend in the law by permitting only the Attorney General to file an extradition complaint. This restriction reflects the fact that the decision to initiate extradition proceedings, like other criminal proceedings in Federal courts, properly lies within the prosecutorial discretion of the chief Federal law enforcement official, the Attorney General.

The restriction will free the courts from any need to determine whether a private person is "authorized" to act on behalf of a foreign government to institute extradition proceedings. It will also significantly reduce the likelihood of extradition proceedings being used by private individuals as a tool for harassment, debt collection, or other improper purposes.

I will turn now very briefly to section 3195. Under present law there is no direct appeal from a judicial officer's finding in an extradition proceeding. A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus. The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition.

The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious. Section 3195 remedies this defect in current procedure by permitting either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision.

Finally, I will discuss the provisions of the bill which confer on the Secretary of State exclusive jurisdiction to determine whether a foreign state is seeking extradition for a political offense or an offense of a political character or for the purpose of punishing a person for his political opinions.

Under present case law the responsibility for making this determination is divided between the judicial and executive branches. The courts decide whether the crime for which extradition is requested is a political offense or an offense of a political character, but they traditionally defer to the Secretary of State the question whether the requesting country's motives in seeking extradition are political.

Since these issues are usually intertwined, the result under current case law has been that the applicability of the political offense exception is decided by the courts in some cases and by the executive branch in other substantially similar cases. The likelihood of inconsistent results is obvious.

Section 3194(a) of the proposed legislation provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs, while section 3196(a)(3) specifies that the Secretary of State has the authority to decline to order surrender if he is persuaded that extradition is sought for one of these reasons. These provisions together assure that the Secretary of State alone shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties. This approach is a desirable one for several reasons.

First, the most modern U.S. extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception. Moreover, as previously stated, under present case law the courts generally defer to the executive branch the question whether the foreign government's extradition request is politically motivated. Thus, the approach adopted in this proposal is not a radical departure from present law. It should be noted that the political offense decisions are made exclusively by the executive branch of government in several foreign countries, including Canada and Germany.

Second, the decision to shield a criminal from extradition on the ground that his offense was "political" is not the kind of issue which lends itself to resolution through the judicial process.

There are few truly objective criteria on which a comprehensive definition of the term "political offense" can be based, and a public court proceeding is not an appropriate or desirable forum for careful analysis of a foreign state's intentions or political system. Rather, a decision on the "political offense" exception is, as the name suggests, inescapably political in nature and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the executive branch to decide—much as the decision to offer political asylum is an executive decision.

Third, a decision on the political offense exception can have a devastating impact on U.S. relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise U.S. efforts to combat international terrorism.

The present law exacerbates this situation, because frequently the U.S. Government, through the Departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court.

Moreover, the Government must take this position publicly, before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against extradition on other grounds. By contrast, the approach taken by the proposed legislation permits a more informed decision on extradition to be made in a manner less likely to be offensive to the foreign government in the case.

In conclusion, for these and the other reasons stated in the detailed memorandum of law printed in the Congressional Record, the Department of State supports the passage of S. 1639.

I would be pleased to respond to any questions the committee may have.

The CHAIRMAN. Thank you very much, Mr. McGovern.

Mr. Abbell, you may proceed.

STATEMENT OF MICHAEL ABBELL, DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY MURRAY STEIN, ASSOCIATE DIRECTOR OF THE OFFICE OF INTERNATIONAL AFFAIRS, AND JOHN HARRIS, OFFICE OF INTERNATIONAL AFFAIRS

Mr. ABBELL. Thank you, Mr. Chairman. I thank you for the opportunity to appear before this committee today on behalf of the Department of Justice to express its strong support for S. 1639—a bill, developed through the close cooperative efforts of the Departments of Justice and State and the staff of this committee, to modernize our grossly antiquated statutes implementing our extradition treaties with foreign countries.

With me today on the far right of this table is Murray Stein, the Associate Director of the Office of International Affairs, who has represented more foreign extradition requests and cases than any other attorney in the history of our country.

On my left is Mr. John E. Harris, also from the Office of International Affairs, who spearheaded the Department of Justice's effort in the development of this joint bill.

The Office of International Affairs is responsible for processing not only Federal extradition requests to foreign countries but also requests by the States and State prosecutors to foreign countries.

Additionally, we represent foreign countries seeking extradition from the United States in courts in the United States or supervise U.S. attorneys throughout this country in the representation of foreign extradition requests.

In large part our success in the representation of foreign countries determines the extent to which they go to bat for the United States when we seek extradition from them.

Rather than read my statement into the record today, I would ask that the committee accept it as written. I wish merely to highlight a few points which are covered in the statement.

The CHAIRMAN. Can we just put your statement into the record?

Mr. ABBELL. Yes, I would appreciate that.

The CHAIRMAN. There is no use in repeating it. In other words, we will take your statement for the record. It will appear immediately following your oral presentation.

Proceed in your own words.

Mr. ABBELL. The main matter I would like to emphasize is that international extradition is a fairly expensive process. Therefore, the cases we request of foreign countries and that foreign countries request of us are generally some of the most important cases which the countries deal in. You do not normally request extradition in a routine case.

A great number of our cases, about a third of them, represent serious crimes of violence, including numerous murder cases. Another third represents major narcotics trafficking cases. Another third represents major fraud cases, white collar crime cases.

The cases we deal with are generally the ones you read about when you are reading papers about fugitives who have fled rather than face trial in important cases. It is a process, because of its expense, that is generally reserved for that purpose.

The bill provides one very major improvement in enabling the United States to apprehend fugitivies from foreign countries, and that is by permitting us to get warrants even though we don't know whether a person is in the United States or, if he is in the United States, precisely where he is in the United States. We will be able to go to the court in the U.S. District in the District of Columbia, get a warrant, and have the warrant entered into the NCIC system so if this fugitive from a foreign country seeks to enter the United States we can arrest him on the spot for extradition.

Similarly, if he is happened upon by a law officer in a State, such as during a traffic stop or something else, and the officer puts his name into the NCIC system and gets a hit, again he can be arrested for extradition and we will be able to proceed with the case immediately.

A number of situations occur when we know people are entering the United States but we simply have nothing more than a possible immigration hold, a short-term hold, on which to hold a person until we can take further measures. If this person happens to be a U.S. citizen, we cannot even use the immigration processes.

Another very major improvement in the bill is the direct appeal provision which for the first time will let the United States as well as the defendants get judicial review of decisions by lower courts. The present situation has forced the United States in a number of cases to file new extradition requests after our first extradition requests have been denied, we believe erroneously, by lower courts.

In a number of instances we have succeeded in getting the initial decision overturned through this circuitous, time-consuming process. It is highly desirable that we have a clear and direct appeal route with very, very limited ability for either the United States or a fugitive to resort to the habeas corpus process.

The third very major improvement in the bill is the one referred to by Mr. McGovern, and that is the removal of the hold determination of the political offense question from the courts to the Secretary of State.

At present this decision is made partly by the court, partly by the Secretary of State. It is basically in our minds a foreign policy decision, much akin to the asylum decision that the Secretary of State is asked to make on a routine basis, and we believe it is one that can be much better dealt with in the executive as opposed to the courts.

With those comments, I, too, am ready to answer any questions that the chairman might have in this area.

The CHAIRMAN. Suggestions have been made in the past that grounds for denial of extradition, such as double jeopardy, should be spelled out in this legislation. What would be your answer to this proposal?

Mr. ABBELL. The provisions such as double jeopardy are contained in virtually all of our extradition treaties. For that reason, we felt it would be redundant to also include them in our legislation. Rather than clutter up the legislation with provisions which we think are unnecessary and provisions which have been covered not only in the past but will be covered in all future treaties, we felt it was better to leave the status as lean and clean as we could. For that reason, we have not included measures like double jeopardy, statute of limitations, and so on.

The CHAIRMAN. If the political offense exception is left to the Secretary of State to decide, how would it work? Would the Secretary develop recognized criteria? Would it be the same considerations as now taken into account for political asylum?

Possibly the representative from the Department of State can answer that.

Mr. McGOVERN. Yes, Mr. Chairman. I would be happy to respond to that question.

I think perhaps one concise way of doing that would be to refer you to the comment on the provisions of section 3196 of the proposed legislation which was printed in the Congressional Record. The comment states in pertinent part:

> The subsection also provides that any evidence or arguments the fugitive wishes to present shall be in writing. The Secretary is not obliged to provide a formal hearing for a fugitive who claims the benefit of the political offense exception, but it is expected that the Secretary will utilize the resources of the State Department for gathering evidence and assessing the fugitive's claim.

I would be happy to be more specific.

The CHAIRMAN. Professor Bassiouni has previously suggested in correspondence to the committee that a "probable cause" standard in extradition cases is a constitutional requirement. What are your views? I would be glad to have the views of both of you on that.

Mr. ABBELL. Thank you, Mr. Chairman. I would like Mr. Harris to speak to that point.

Mr. HARRIS. Probable cause is a constitutional requirement for arrest. We have been unable to find any case law that indicates that it is a constitutional requirement for extradition. Since the two, arrest and extradition, are logically separate it would be a mistake to confuse that standard for both.

For instance, section 3192(c) of the draft legislation permits extradition to proceed without an arrest where there is no likelihood of the accused fleeing. It permits the issuance of a summons.

For that reason, the standard for extradition should be determined by looking to the treaty.

Each of the extradition treaties to which the United States is party specifically provides that extradition takes place only if there is such evidence of criminality as would justify commital for trial had the crime been here committed.

The extensive case law in this issue, indeed the draft legislation itself, provides that where that language appears in that treaty, and as I said it is in all of our treaties, that is satisfied by probable cause. In short, the probable cause standard is already contained in all of our treaties, and, as Mr. Abbell said, it would be unnecessary to specify it again in the legislation.

The CHAIRMAN. I want to thank you gentlemen very much for your appearance today.

[Material follows:]

TESTIMONY OF DEPUTY LEGAL ADVISER DANIEL W. MCGOVERN
BEFORE THE
SENATE JUDICIARY COMMITTEE
OCTOBER 14, 1981

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE YOU TO EXPRESS THE DEPARTMENT OF STATE'S POSITION ON S.1639 -- THE PROPOSED "EXTRADITION ACT OF 1981." IN MY PREPARED TESTIMONY TODAY I WILL CONFINE MYSELF TO A DISCUSSION OF THE THREE PROVISIONS OF THE BILL WHICH THE SECRETARY OF STATE SINGLED OUT FOR COMMENT IN HIS LETTER TO CHAIRMAN THURMOND ENDORSING THE PROPOSED LEGISLATION. IN THAT LETTER, DATED AUGUST 25, 1981, SECRETARY HAIG STATED:

> "THE DEPARTMENT OF STATE IS PARTICULARLY PLEASED WITH THE PROVISIONS OF THE BILL WHICH PROVIDE MORE EFFECTIVE FEDERAL CONTROL OVER FILING OF EXTRADITION REQUESTS IN THIS COUNTRY (SECTION 3192); WHICH FOR THE FIRST TIME PERMIT APPEAL FROM A DISTRICT COURT'S DECISION ON AN EXTRADITION REQUEST (SECTION 3195); AND WHICH PLACE IN THE SECRETARY OF STATE THE DETERMINATION WHETHER EXTRADITION SHOULD BE REFUSED ON POLITICAL OFFENSE GROUNDS (SECTION 3196(A)(3)). TAKEN TOGETHER, THESE PROVISIONS SHOULD REDUCE THE RISK OF ADVERSE FOREIGN POLICY CONSEQUENCES WHICH FLOW FROM EXTRADITION EITHER IMPROPERLY INITIATED OR IMPROPERLY REFUSED. AT THE SAME TIME, EVERY EFFORT HAS BEEN MADE TO PRESERVE THE PROTECTION OF INDIVIDUAL RIGHTS."

IN DISCUSSING THESE THREE PROVISIONS I WILL DRAW EXTENSIVELY UPON THE DETAILED LEGAL MEMORANDUM SUBMITTED IN SUPPORT OF S.1639 AND PRINTED WITH IT IN THE CONGRESSIONAL RECORD.

I will first address section 3192, which specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government. The present statutory scheme does not specify who may file complaints in extradition matters. ¶ The rule developed by the courts appears to be that anyone acting under the authority of the demanding government may file a complaint for extradition. Thus, extradition cases have been instituted by diplomatic or consular representatives, foreign police officers, and even private citizens who claim to be acting on behalf of a foreign government. This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government. ¶ However, in recent years, the Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition, or pursuant to an informal international agreement for reciprocal legal representation.

Section 3192 completes and codifies this desirable trend in the law by permitting only the Attorney General to file an extradition complaint. This restriction reflects the fact that the decision to initiate extradition proceedings, like other criminal proceedings in the federal courts, properly

LIES WITHIN THE PROSECUTORIAL DISCRETION OF THE CHIEF FEDERAL LAW ENFORCEMENT OFFICIAL, THE ATTORNEY GENERAL. THE RESTRICTION WILL FREE THE COURTS FROM ANY NEED TO DETERMINE WHETHER A PRIVATE PERSON IS "AUTHORIZED" TO ACT ON BEHALF OF A FOREIGN GOVERNMENT TO INSTITUTE EXTRADITION PROCEEDINGS. IT WILL ALSO SIGNIFICANTLY REDUCE THE LIKELIHOOD OF EXTRADITION PROCEEDINGS BEING USED BY PRIVATE INDIVIDUALS AS A TOOL FOR HARASSMENT, DEBT COLLECTION, OR OTHER IMPROPER PURPOSES.

I WILL TURN NOW VERY BRIEFLY TO SECTION 3195. UNDER PRESENT LAW THERE IS NO DIRECT APPEAL FROM A JUDICIAL OFFICER'S FINDING IN AN EXTRADITION PROCEEDING. A PERSON FOUND EXTRADITABLE MAY ONLY SEEK COLLATERAL REVIEW OF THE FINDING, USUALLY THROUGH AN APPLICATION FOR A WRIT OF HABEAS CORPUS. THE FOREIGN GOVERNMENT THAT IS DISSATISFIED WITH THE RESULTS OF THE HEARING MUST INSTITUTE A NEW REQUEST FOR EXTRADITION.

¶ THE LACK OF DIRECT APPEAL IN EXTRADITION MATTERS ADDS UNDESIRABLE DELAY, EXPENSE AND COMPLICATION TO A PROCESS WHICH SHOULD BE SIMPLE AND EXPEDITIOUS. SECTION 3195 REMEDIES THIS DEFECT IN CURRENT PROCEDURE BY PERMITTING EITHER PARTY IN AN EXTRADITION CASE TO APPEAL DIRECTLY TO THE APPROPRIATE UNITED STATES COURT OF APPEALS FROM A JUDGE OR MAGISTRATE'S DECISION.

FINALLY, I WILL DISCUSS THE PROVISIONS OF THE BILL WHICH CONFER ON THE SECRETARY OF STATE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER A FOREIGN STATE IS SEEKING EXTRADITION FOR A POLITICAL OFFENSE OR AN OFFENSE OF A POLITICAL CHARACTER OR FOR THE PURPOSE OF PUNISHING A PERSON FOR HIS POLITICAL OPINIONS.

Under present case law the responsibility for making this determination is divided between the Judicial and Executive branches. The courts decide whether the crime for which extradition is requested is a political offense or an offense of a political character, but they traditionally defer to the Secretary of State the question whether the requesting country's motives in seeking extradition are political. ¶ Since these issues are usually intertwined, the result under current case law has been that the applicability of the political offense exception is decided by the courts in some cases and by the Executive branch in other, substantially similar cases. The likelihood of inconsistent results is obvious.

Section 3194(a) of the proposed legislation provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs, while section 3196(a)(3) specifies that the Secretary of State has the authority to decline to order surrender if he is persuaded that extradition is sought for one of these reasons. These provisions together assure that the Secretary of State alone shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties. This approach is a desirable one for several reasons.

First, the most modern United States extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception. Moreover, as previously stated, under present case law the courts generally defer to the Executive branch the question whether the foreign government's extradition request is politically motivated. Thus, the approach adopted in this proposal is not a radical departure from present law. It should be noted that the political offense decisions are made exclusively by the executive branch of government in several foreign countries, including Canada and Germany.

Second, the decision to shield a criminal from extradition on the ground that his offense was "political" is not the kind of issue which lends itself to resolution through the judicial process. There are few truly objective criteria on which a comprehensive definition of the term "political offense" can be based, and a public court proceeding is not an appropriate or desirable forum for careful analysis of a foreign state's intentions or political system. Rather, a decision on the "political offense" exception is, as the name suggests, inescapably political in nature, and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the Executive branch to decide -- much as the decision to offer political asylum is an executive decision.

THIRD, A DECISION ON THE POLITICAL OFFENSE EXCEPTION CAN HAVE A DEVASTATING IMPACT ON UNITED STATES RELATIONS WITH THE REQUESTING COUNTRY. THE POTENTIALLY CRIPPLING EFFECT OF SUCH DECISIONS ON FOREIGN AFFAIRS IS PARTICULARLY GREAT WHERE IT COULD COMPROMISE UNITED STATES EFFORTS TO COMBAT INTERNATIONAL TERRORISM. ¶ THE PRESENT LAW EXACERBATES THIS SITUATION, BECAUSE FREQUENTLY THE UNITED STATES GOVERNMENT, THROUGH THE DEPARTMENTS OF STATE AND JUSTICE, MUST TAKE A POSITION ON THE APPLICABILITY OF THE POLITICAL OFFENSE EXCEPTION WHILE THE CASE IS BEFORE THE COURT. ¶ MOREOVER, THE GOVERNMENT MUST TAKE THIS POSITION PUBLICLY, BEFORE ALL THE EVIDENCE AND ARGUMENTS ARE IN, AND DESPITE THE FACT THAT THE COURT OR THE SECRETARY OF STATE MAY SUBSEQUENTLY DECIDE AGAINST EXTRADITION ON OTHER GROUNDS. BY CONTRAST, THE APPROACH TAKEN BY THE PROPOSED LEGISLATION PERMITS A MORE INFORMED DECISION ON EXTRADITION TO BE MADE IN A MANNER LESS LIKELY TO BE OFFENSIVE TO THE FOREIGN GOVERNMENT IN THE CASE.

IN CONCLUSION, FOR THESE AND THE OTHER REASONS STATED IN THE DETAILED MEMORANDUM OF LAW PRINTED IN THE CONGRESSIONAL RECORD, THE DEPARTMENT OF STATE SUPPORTS THE PASSAGE OF S.1639.

I WOULD BE PLEASED TO RESPOND TO ANY QUESTIONS THE COMMITTEE MAY HAVE.

Department of Justice OCT 20 1981

Testimony of Michael Abbell, Director
Office of International Affairs
Crimininal Division
Department of Justice
Before The
Senate Judiciary Committee
October 14, 1981

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear before this Commitee today on behalf of the Department of Justice to express its strong support for S.1639 -- a bill, developed through the close cooperative efforts of the Departments of Justice and State and the staff of this Commitee, to modernize the grossly antiquated statutes implementing our extradition treaties with foreign countries.

With me today are Murray R. Stein, the Associate Director of the Office of International Affairs, who has represented more foreign extradition requests in our federal courts than any other attorney in the history of our country, and John E. Harris, a senior trial attorney in OIA, who spearheaded the Department of Justice's effort in the development of S.1639 and the supporting memorandum of law.

The Office of International Affairs, among other things, advises federal and state prosecutors in preparing extradition requests to foreign countries, processes those requests, and serves as liaison with the appropriate foreign and State Department officials in connection with the execution of those requests. OIA is also responsible for the representation, or the supervision of the representation, of foreign extradition requests in our federal courts.

Our present international extradition laws were enacted in the 1840's and 1880's to implement extradition treaties in an era in which extradition to and from the United States was very rare because of the slowness of international travel and the facilities of international commerce. Until the 1970's, it was a rare year that the United States handled more than ten such requests.

With the tremendous growth of wide-bodied jet international air travel and high speed telecommunications in the past decade, and with the United States' increased realization of its responsibilities to the international community and to itself in effectively combatting transnational criminal activity during that same period, there has been a corresponding growth in the number of extradition requests by and to the United States -- particularly in the two and one-half years since OIA's

CREATION. WHILE SUCH REQUESTS SELDOM EXCEEDED TEN PER YEAR PRIOR TO 1970, BY 1979 WE WERE HANDING CLOSE TO 150 REQUESTS. IN 1980 WE HANDLED 218 REQUESTS, AND THIS YEAR WE EXPECT TO HANDLE APPROXIMATELY 250 TO 300 REQUESTS.

THE LAWS DESIGNED TO DEAL WITH INTERNATIONAL EXTRADITION IN THE WORLD OF THE HORSE AND BUGGY AND THE "TALL SHIPS" SIMPLY DO NOT MEET THE NEEDS OF A WORLD IN WHICH CRIMINALS CAN TRANSFER MILLIONS OF DOLLARS FROM ONE COUNTRY TO ANOTHER IN A MATTER OF SECONDS AND CAN FLEE HALF WAY AROUND THE WORLD IN LESS THAN A DAY.

THE ENACTMENT OF S.1639 WILL ENABLE THE UNITED STATES TO MUCH MORE EFFICIENTLY AND EFFECTIVELY MEET ITS INTERNATIONAL EXTRADITION RESPONSIBILITIES IN THE 1980S AND BEYOND. LIKE OTHER COUNTRIES' EXTRADITION LAWS, WHICH ARE PRIMARILY DESIGNED TO PERMIT THOSE COUNTRIES TO MEET THEIR TREATY RESPONSIBILITIES, S.1639 IS DESIGNED TO FACILITATE THE APPREHENSION IN, AND EXTRADITION FROM, THE UNITED STATES OF FOREIGN FUGITIVES. IN ADDITION TO PERMITTING US TO MORE EFFECTIVELY REMOVE SUCH CRIMINALS FROM OUR MIDST, S.1639 SHOULD ENABLE US TO IMPROVE OUR SUCCESS IN OBTAINING THE EXTRADITION OF UNITED STATES' FUGITIVES FROM FOREIGN COUNTRIES IN THAT THE SUCCESS OF OUR EFFORTS TO SECURE EXTRADITION FROM FOREIGN COUNTRIES IS CLOSELY LINKED TO OUR SUCCESS IN RESPONDING TO EXTRADITION REQUESTS FROM THOSE SAME COUNTRIES.

Among the most important improvements S.1639 makes are:
(1) It permits the United States to secure a warrant for the arrest of a foreign fugitive even though we do not know the fugitive's whereabouts in the United States, or even if he is in the United States. This warrant can then be entered into the FBI's NCIC system so that if the fugitive attempts to enter the United States or is apprehended in the United States for other reasons, he can be identified and arrested immediately for extradition to the requesting country.

(2) It provides a statutory procedure for waiver of extradition -- a feature which protects a fugitive's rights, while facilitating his removal to the requesting country, in instances in which he is willing to voluntarily go to the requesting country instead of insisting on a formal extradition hearing.

(3) It permits both a fugitive and the United States, on behalf of the requesting country, to directly appeal adverse decisions by an extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus, and the only option available to the United States, on behalf of a requesting country, is to refile the extradition complaint.

(4) It clarifies the applicable standard for bail at all stages of an extradition case. Current United States extradition and bail statutes do not specifically cover persons arrested for extradition. S.1639 applies a bail standard largely derived from the standard which has evolved in federal court decisions.

(5) It establishes clear statutory procedures and standards applicable to all critical phases of the handling and litigation of a foreign extradition request.

(6) It makes the determination of whether the requesting country is seeking extradition of a person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing a person for his political opinions solely that of the Secretary of State. This provision, which has been addressed in greater detail by Deputy Legal Adviser McGovern of the Department of State, is critical to the effectiveness of extradition as a tool in the fight against international terrorism.

Among the other important improvements S.1639 makes are: (1) it limits access to United States courts in

CONNECTION WITH FOREIGN EXTRADITION REQUESTS TO CASES INITIATED BY THE ATTORNEY GENERAL; (2) IT PERMITS USE OF A SUMMONS INSTEAD OF A WARRANT OF ARREST IN APPROPRIATE CASES; (3) IT CODIFIES THE RIGHTS OF A FUGITIVE TO LEGAL REPRESENTATION AND TO A SPEEDY DETERMINATION OF AN EXTRADITION REQUEST; (4) IT SIMPLIFIES AND RATIONALIZES THE PROCEDURES FOR AUTHENTICATING DOCUMENTS FOR USE IN EXTRADITION PROCEEDINGS; (5) IT FACILITATES TEMPORARY EXTRADITION OF FUGITIVES TO THE UNITES STATES; AND (6) IT PREVENTS THE UNITED STATES FROM BECOMING A HAVEN FOR AMERICANS WHO COMMIT SERIOUS CRIMES IN FOREIGN COUNTRIES.

THE PASSAGE OF S.1639 WILL RESULT IN A MAJOR IMPROVEMENT IN THE UNITED STATES' ABILITY TO MEET ITS INTERNATIONAL EXTRADITION RESPONSIBILITIES IN AN ERA IN WHICH CRIMINALS, INCLUDING TERRORISTS, INCREASINGLY ATTEMPT TO USE INTERNATIONAL BOUNDARIES TO FRUSTRATE LAW ENFORCEMENT EFFORTS. THE DEPARTMENT OF JUSTICE BELIEVES THAT IT IS VERY IMPORTANT THAT S.1639 BE ENACTED.

The **Chairman**. We will now call Professor Bassiouni.

Professor Bassiouni, we would be glad to hear any statement you wish to make or I can just ask you some questions.

STATEMENT OF PROF. M. CHERIF BASSIOUNI, SCHOOL OF LAW, DePAUL UNIVERSITY, CHICAGO, ILL.

Professor **Bassiouni**. I would like to ask the chairman's permission to put a statement in writing in the record at a later date. I have been unable to prepare one for today's hearing due to the shortage of time and the notice I have had to appear before this committee.

May I then simply proceed with some observations and allow the committee to ask whatever questions it deems appropriate?

Although I have had the opportunity to work with several of the persons who have testified prior to my own testimony here, and I certainly acknowledge their expertise on the subject, I respectfully differ from their views that this draft legislation is indeed an improvement over the existing legislation.

I think that it is lacking in many respects, and I would like to start, first, by highlighting a basic policy consideration which is critical to the entire draft. The question is whether or not procedural legislation such as this one will control extradition procedures or whether each and every treaty will become a separate procedural code that will control each and every case.

The way the legislation is drafted, is that in effect it defers to each and every treaty to establish by its own provisions a separate procedural code. This in my judgment runs contrary to a policy of uniformity and harmonization because it will mean that if we have treaties with 150 countries in the world each one of these treaties will govern as to any given issue and, therefore, we will have different decisions in different circumstances on different issues which will not be harmonized and will possibly be in conflict with respect to various treaties.

I see no reason why this legislation should not be the principal source of procedural rules to which a given treaty may derogate by exception as opposed to having each and every treaty being the general rule and the legislation being the exception.

The response of Mr. Harris of the Department of Justice concerning probable cause and the prior response concerning double jeopardy are cases in point. If probable cause or double jeopardy are included in every treaty, does it not make more sense to include it first in the legislation? Therefore, it would seem to me what we should strive for is to develop procedural rules in this legislation which will cover all of the procedural aspects of extradition, thus making the treaty the exception rather than the general rule.

Before going into any of the technical questions which I would like to raise, I would like to address myself also to the very controversial question, indeed radical suggestion, of leaving the determination of the political offense exception to the executive branch. That question has historically been vested in the judicial branch.

I see no reason why one should manifest such degree of distrust in the judiciary to move the question away from the judiciary to the executive branch. Historically the judiciary has been more amenable to developing standards of objectivity to which the executive has not always been amenable.

I think we can find that the application of due process and equal protection through the development of legislative criteria that the judiciary would apply would indeed be more preferable than to pass on that power to the executive without any criteria, any guidelines or standards, or procedures for review.

Reference was made to questions of political asylum and I must point out that political asylum under the 1980 Refugee Act has very clear guidelines, and therefore if the intent here is to set up legislative guidelines with review, I would agree with that approach. However, the present draft, without any guidelines or review, is very dangerous.

I also think that although the political offense exception presents issues of foreign policy, it becomes very dangerous to unnecessarily pit the Government of the United States against a foreign requesting government with respect to such issues when indeed the judiciary can serve as a very effective bulwark against this type of difficulty.

My first choice would therefore be to set up legislative guidelines for the political offense exception for the judiciary to apply, and only as a second alternative to set up legislative guidelines for the Secretary of State to apply with some mechanism for review.

On the more technical side, I think it is very important to reinstate in the legislation the requirement of probable cause; although it may be included in each and every extradition treaty, it must also be in the legislation.

I also think it is important to state that probable cause should be determined in accordance with Federal standards as opposed to being determined by State standards.

I would also like to recommend that in extradition reliance be not only on bilateral treaties but also on multilaterial treaties. The United States has entered a number of multilateral treaties—on narcotics, terrorism, hijacking, and others—which contain a provision on extradition and could be an alternative basis for extradition to bilateral treaties. That in my judgment would assist a great deal with respect to countries with which the United States does not have a treaty and where such multilateral treaties would be the basis.

The legislation should be reexamined, particularly section 3192, with respect to the criteria which are involved. Unless I am misreading the legislation, it appears to me that the statement of essential facts constituting the offense would be sufficient to result in a provisional arrest. I would like to suggest that there be here a distinction which would be made between the situation where an arrest warrant has been issued by a foreign country without any formal charges, an arrest warrant has been issued along with formal charges, such an indictment or information, and an arrest warrant issued on the basis of an existing judgment of conviction.

These distinctions should correspond to separate requirements for each one of them. If the request for extradition is accompanied by an arrest warrant which is incidental to a charging instrument such as an indictment, that document should accompany the request.

If the arrest warrant is incidental to a judgment of conviction, this judgment should be included.

In any event, that a description of the facts and circumstances evidencing probable cause should accompany the request in any of these cases.

With respect to the provision on bail, the legislation here has taken up specifically what various decisions have referred to as the eligibility for bail under 'special circumstances' which appear at the top of page 5, line 1.

Special circumstances have been the source of a great problem in judicial interpretations applying this standard. I would suggest that since we have the opportunity of drafting new legislation that it include certain criteria, such as: that the individual if ordered extradited shall voluntarily comply; that the court consider the nature of the offense charged; the dangerousness of the relator; the existence of probable cause on the face of the record; the safety of witnesses or other persons involved.

These are some of the criteria which should be taken into account, rather than using the words "special circumstances" without further explanation. I would prefer the approach that would place the burden of proving eligibility to bail on the relator who has to show the existence of certain factors in conformity with legislative criteria.

This will avoid a great deal of difficulty and inconsistency that the judiciary has faced in trying to apply this standard of special circumstances.

The legislation should also clearly state that an individual, whether he is waiving the hearing or not, should first and foremost be informed of the offense for which he is requested, and that the court is to advise an individual of certain rights, which the legislation fails to state.

The legislation should be reexamined with respect to limitations on the petition pending removal, and the question should be decided by the judiciary. I refer here to line 4 of the legislation—which refers to "petition of court for release."

Does the word "release" mean vacating the order or does it mean release on bond? I think that this question should be clarified.

In my judgment, if an individual is not removed during a certain period of time he should be released on bond pending a further determination as opposed to having the order vacated altogether. That possibility should also be considered in time.

With respect to the question of evidence, there is also a variety of problems which the legislation fails to address. The legislation should clearly spell out that the rules of evidence should be those of the Federal Rules of Criminal Procedure and that the court, in considering matters of probable cause and rules of evidence, should apply Federal standards so that we avoid the difficulties which we now have in some decisions applying Federal standards and other decisions applying State standards.

The relator should be permitted to present evidence challenging the sufficiency of the Government's evidence on the issue of probable cause.

Concerning the findings of the court, it would seem to me, under subparagraph (d), page 9, that the first finding that the court should make is whether the court had jurisdiction in the case. The legislation fails to state that.

The court must make a finding that the evidence presented is sufficient to support a finding of probable cause to believe that such a person has committed the crime.

With respect to the principle of double criminality which is embodied in the legislations, I would strongly suggest that the wording on lines 7, 8, and 9 of page 10 be reworded so that it would say that the act upon which the request for extradition is based would constitute an offense punishable under the laws of the requesting State and under the laws of the United States or the State where the fugitive is found.

I am somewhat confused by (c) which refers to a majority of States. The alternative to that type of language, if it is deemed too restrictive by the Department of Justice, would be simply to say, "any State in the United States." I would prefer that language to that of "the majority of States."

I would also suggest here that the findings of the court also include a finding of probable cause and that evidentiary matters are to be determined by the court in accordance with Federal law.

On appeal, the determinations of bail should be based on the same standards that are applicable in the original determination of whether the individual should be eligible for bail before the hearing as discussed above.

The legislation fails to refer specifically to transit extradition, and I would strongly recommend that we have a provision there on transient extradition. Transient extradition is a situation where, for example, the Canadian authorities have extradited to the Mexican authorities an individual who is on a plane that lands in New York for refueling. That individual would be detained in the United States unlawfully, and a petition for habeas corpus can be filed to request his release unless permission for transit extradition has been granted. That is important to include in the legislation to avoid such a problem.

There should also be a provision on conditional extradition, namely, that the United States can conditionally extradite to another State. There is a provision which permits conditional extradition to the United States but not a similar provision in the other direction.

The legislation is also silent on a number of questions such as double jeopardy, statute of limitations, immunity, and the question of cruel and unusual punishment in the territory or State wherein the individual could be returned. These questions should be covered in the legislation as opposed to being left to the determination of each and every treaty.

I am sure that my learned colleagues at the Departments of Justice and State have sought to render this piece of legislation as uncumbersome as possible and as flexible as possible in the hands of the Department of Justice and the Department of State, but I think that the overall national interest and the safeguard of constitutional rights would be better served if the legislation would be comprehensive and complete and include all those procedural matters which they would otherwise leave to each and every treaty subject to the vagueness of treaties and political circumstances.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you, Professor Bassiouni.

Why should a standard of probable cause be required in the international extradition under the fourth amendment? Are there any cases that so hold?

Professor **BASSIOUNI**. I agree with Mr. Harris' distinction as to the standard of probable cause. Probable cause is a constitutional requirement with respect to the arrest of an individual.

Mr. Harris' position is that it is not a constitutional requirement with respect to the extradition, and he is correct insofar as no decision has been rendered in the United States stating that probable cause is a contitutional requirement for extradition. However, since extradition always follows the arrest and probable cause is required for the arrest, then it has always followed logically that the standard of probable cause for extradition would be upheld.

Indeed, it was testified here earlier that every extradition treaty contains a probable cause provision, and since that is the case I see no reason why the legislation should not contain it specifically.

The **CHAIRMAN**. Under what circumstances would you permit a fugitive from justice from a foreign country to obtain bail pending an extradition proceeding in this country?

Professor **BASSIOUNI**. I think that the burden of proving admissibility to bail should rest on the relator and that there should be legislative criteria setting forth what is the basis upon which bail should be given as I stated earlier.

The first of these should be to insure that the relator would voluntarily comply with the extradition order should the decision of the court be that he should be extradited.

The other criteria should be similar to the criteria that we have for bail in other criminal cases, that is, the dangerousness of the relator, the nature of the crime for which he is requested, and whether or not on the face of the record there is probable cause to believe that the individual has committed the offense charged.

I believe those should be the criteria which should be set forth in the legislation and that the judiciary should apply.

The **CHAIRMAN**. You have observed in the past that provisional arrest provisions should be carefully drafted to protect the relator's constitutional rights. Would you outline those constitutional rights? How would you change the bill to protect those rights?

Professor **BASSIOUNI**. I believe we have to examine the conflicting interests at stake here. On one hand we have the interest of a foreign state as well as the U.S. Government to apprehend an individual who, if he finds out that a request for extradition is pending, may flee, and therefore this is a legitimate interest that should be preserved.

On the other hand, we should counterbalance that interest with the fact that under the proposed draft a person could be detained if a foreign government sends a telex to the Department of Justice which states "Arrest Mr. Jones, we will send the papers within 60 days". In my judgment that would not be sufficient. I think there should be some criteria for the court to apply in determining whether or not there is more than the naked assertion of a foreign government that would be sufficient to put somebody in jail for up to 60 days.

In any event, I think should an individual be eligible for bail, then the court should examine the issue of probable cause as with any other instances where an individual's liberty or freedom is impaired by his arrest.

The CHAIRMAN. What criteria would you use for determining what a political offense is?

Professor BASSIOUNI. Historically the U.S. courts have recognized that for the application of the relative political offense exception the context must be one of war, insurrection, or civil strife; that the individual engages in an act of violence against the State or its political institutions or structure; and that there is a logical nexus between the motives and intentions of the individual and the target that he selects, excluding, of course, international crimes.

With respect to the relative political offense, these should be the criteria to embody in the legislation.

Again reiterating what I said earlier, I would strongly recommend that the legislation include those criteria and allow the judiciary to apply them. If the decision is to allow the executive to apply them these criteria should still be placed in the legislation and a right to review available to the relator.

The CHAIRMAN. Thank you very much, Professor Bassiouni. We appreciate your presence.

Professor BASSIOUNI. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. William M. Hannay, attorney at law, Chicago.

Mr. Hannay, you have a rather long statement here and I have to finish this hearing in 15 minutes. We will insert your statement in the record and let you proceed off the cuff. Highlight it.

STATEMENT OF WILLIAM M. HANNAY, ATTORNEY AT LAW, CHICAGO, ILL.

Mr. HANNAY. I am pleased to testify on the proposed Extradition Act of 1981. I am an attorney with the law firm of Schiff, Hardin & Waite.

I have been an assistant district attorney in the past. Since 1973 I have studied and written about international terrorism on several occasions. Most recently, I have written a law review article with respect to the political offense exception of extradition treaties. With your permission, I ask to insert that article into the record along with a prepared statement as part of my testimony.

The CHAIRMAN. Without objection.

Mr. HANNAY. I would like to restrict my remarks to one provision of the proposed legislation, that which purports to take away the jurisdiction of the courts over the political offense determination. The question that needs to be answered is why exclude the judiciary from its long-standing role in the political offense determination? The answer lies in three recent extradition cases.

One is the *Peter McMullen* case decided in San Francisco about 2 years ago. The second is the *Abu Eain* case decided in Chicago last year which only yesterday had certiorari denied by the U.S. Supreme Court. The third is the *Desmond Mackin* case decided in New York City only 2 months ago.

Reading these three cases it becomes clear to me that there is a problem with the way courts, in particular with the way magistrates, have perceived the political offense exception. Not only in these three cases but going back as far as the 1890's, they have misinterpreted, indeed ignored, the purpose and origin of the political offense exception, ignored it in a way that leads to the sort of shocking results represented by these recent extradition cases.

In the *Peter McMullen* case, a man who was a professed member of the Provisional Irish Republican Army was charged with blowing up a military barracks—not in Northern Ireland but in England. In the *Desmond Mackin* case another member of the PIRA was charged with shooting a British soldier who was in civilian dress standing at a bus stop in Belfast. In the *Abu Eain* case an alleged member of the PLO was charged with detonating a bomb on the streets of a resort town in Israel with the result that two children were killed.

The CHAIRMAN. You covered all that in your statement?

Mr. HANNAY. Yes, sir, I wanted to lay a basis for my next statement.

The two PIRA fugitives have had their extradition denied because they were allegedly political offenders. The PLO fugitive remains here after 2 years of court battles over his political offender status.

In each of these cases the courts—the magistraties in the *Mackin* and *McMullen* cases and the seventh circuit in the *Abu Eain* case—applied a test which goes back to the 1890's from England, a test called the Castioni test.

That test is in essence what Professor Bassiouni has just described to you as the criteria which he would have this Congress place into the legislation. I suggest it is the reliance on that test which has led to a serious problem.

I suggest to you that if one examines the origin of the political offense exception, it was not to prevent a State from sending someone back that it believes should be extradited but it was put there to provide the State a flexible way to protect those that it believes should not be extradited. The political offense exception was not created to allow a politically motivated individual to kill a soldier or a policeman or a politician or a civilian in a foreign country and obtain asylum here.

The question which needs to be answered is whether the fugitive is someone who should be returned or someone who should be protected, based upon a weighing of the interests of society, the rule of law, and international order as well as a concern for individual rights. That is the purpose, I suggest, of the political offense exception. However, the courts have ignored this and adopted a test which has become inflexible and ultimately brutal.

I believe that the purpose of the political offense exception suggests that it should be a determination made by the Secretary of State, by the executive branch which has the ability and, most importantly, the discretion and flexibility to understand the particular situation and make a decision that is fair and just in each situation.

The mechanism by which this determination would be made under the proposed legislation is described in section 3196(a)(3). I would suggest that one change be made in the legislation.

In particular, I want to talk about reviewability. The statute does not now indicate whether the Secretary's determination regarding the political offense exception is reviewable by courts. However, it would be purposeless to take away from the courts jurisdiction over this determination initially if reviewability is allowed after the Secretary's determination.

Therefore, I suggest that, if review on habeas corpus or on mandamus is intended to be precluded, as I believe it should be, then the statute should so state. It should state that the decision of the Secretary with respect to these matters shall be final and conclusive, and no court of the United States shall have power or jurisdiction to review any such decision.

In that way, and I am afraid only in that way, can we be certain that we are not going to have an issue coming in the back door that we have tried to preclude from coming in the front door of the courts.

There is one other point I would like to make if I may. I would like to draw your attention to footnote 55 of the memorandum regarding extradition legislation which is included in the Congressional Record.

Footnote 55 states as follows: "Basically a political offense is one committed in the course of furthering civil war, insurrection, or political commotion." This is the Castioni test. I do not understand that statement to be the drafters' definition of what the political offense really is. The purpose of this legislation is to allow the Secretary the flexibility to determine what a political offense is.

The statement in footnote 55 merely indicates what some courts believe a political offense to be. But this definition is wrong. Even as it stands, it is only a half correct statement for it fails to describe the well-known category of pure political offenses, that is, treason, sedition, or espionage. These were to a large extent the original types of political offenses.

I would suggest footnote 55 be changed to describe pure political offenses and also to state, if you accept my analysis, that the definition contained there may be what some courts have said but it is not the correct definition.

That concludes my remarks, sir.

The CHAIRMAN. Thank you very much.

Should there be, as Professor Bassiouni has suggested, specific criteria for determining what a political offense exception is?

Mr. HANNAY. No, sir, there should not. A political offense is in fact undefineable. Whenever you try to define political offense, when you follow a criteria as the courts have tried to do, such as the Castioni test, you end up with a definition which is both overinclusive and underinclusive. Instead of having a fair determination of each case separately, the individual case is forced to fit into previous decisions with the result, such as that in *Mackin* and *McMullen,* of condoning violence. Therefore, there should be no specific criteria.

Let me elaborate. It is possible to identify particular political offenses which should not be extraditable, or alternatively particular offenses which should be extraditable. That is the approach we have taken in a number of multilateral conventions.

You can identify types of victims who are so deserving of protection that the political offense exception should not apply. This is the approach we have taken in the IPP convention and the Hostage convention.

However, those are partial solutions, ones useful in an international context where we are trying to limit the discretion of some other country to avoid extraditing a terrorist. When a state says "Oh, well, we don't want to sent him back because he's a political offender," we need to be able to say "You have to send him back because it is specifically covered by a convention."

However, that is not the approach we should take domestically.

The CHAIRMAN. Would you comment on the following observation previously made by Professor Bassiouni: The political offense exception should be a judicial one, not a political one, so as to afford equal protection? Why would equal protection be involved in this issue at all?

Mr. HANNAY. I find it hard to understand how equal protection is being used in that context. One can think of equal protection problems such as possibly a difference in treatment between citizens and noncitizens, which might squarely raise an equal protection issue. However, I do not see an equal protection issue arising out of the change that is being proposed by this legislation at all. There is no due process right to any judicial participation in the extradition process at all; even a judicial probable cause hearing could be done away with.

The CHAIRMAN. Under criteria presently applied by our courts, is there a possibility that any of the following situations could be a political offense: The assassination of Lord Mountbatten; the killing of a British soldier in Ireland; the assassination of Anwar Sadat?

Mr. HANNAY. I believe that the Secretary of State could and should determine that none of these are political offenses. On the other hand, it seems to me that, under the Castioni test, some U.S. courts might very well say that these are political offenses which do not justify extradition. I think those decisions would be wrong. I think they would be immoral, unethical, and unjust. However, they would flow from the use of precisely the criteria that Professor Bassiouni is suggesting to you, from the definition described in footnote 55 of the legislative history here, which states: "A political offense is one committed in the course of furthering civil war, insurrection, or political commotion."

Loosely speaking, there is plenty of political commotion is this world in any country; certainly there is in Northern Ireland, for example. The assassination of Lord Mountbatten, if you ask the IRA, was done in furtherance of the "commotion." The assassination of President Sadat was—at least if you ask the Moslem fundamentalists—done in furtherance of a political and religious "commotion."

Therefore, the application of the very criteria which have been suggested to you today might well prevent the extradition of such assassins. I suggest to you that this was never the intention of the political offense exception, and it should certainly not be the result that this Congress permits.

The CHAIRMAN. Thank you very much.

[Prepared statement of Mr. William M. Hannay follows:]

STATEMENT OF WILLIAM M. HANNAY, A MEMBER OF THE BAR OF ILLINOIS, BEFORE THE SENATE JUDICIARY COMMITTEE, OCTOBER 14, 1981

Mr. Chairman, Members of the Committee:

I am pleased to have this opportunity to testify on the proposed "Extradition Act of 1981" (S. 1639) and to express strong support for its passage.

My name is William M. Hannay, and I am a lawyer with the Chicago, Illinois and Washington, D.C. law firm of Schiff Hardin & Waite. Prior to entering private practice, I served as an Assistant District Attorney in New York City. Since 1973, I have studied and written about international terrorism on several occasions. I have been a member of the American Bar Association's Terrorism Committee and am presently a member of the American Bar Association's Criminal Code Revision Committee. Today, however, I am testifying solely as a concerned private citizen; the A.B.A. has not taken a position with regard to these issues as yet.

THE PROPOSED EXTRADITION ACT OF 1981:
An Essential Improvement to U.S. Anti-Terrorism Efforts

The United States has been in the forefront of those nations advocating mandatory extradition or prosecution of terrorists, the concept embodied in the Hague Convention with respect to skyjackers1/ and in other multilateral agreements. However, because of flaws recently revealed in our own extradition procedures, we find that we cannot practice what we preach. Unreviewable misinterpretations of extradition treaties by lower level judicial officials have recently prevented the extradition of two terrorists and created a dangerous precedent at home and abroad. The ironic result is to make our country a safe haven for terrorists and to put the imprimatur of our courts on the violent acts of those who have no respect for human life, for democratic process, or for the Rule of Law. On September 18, 1981, legislation was introduced by a bipartisan group of U.S. Senators to correct this situation.

1/ 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

The Extradition Act of 1981 (S. 1639) was cosponsored by Senators Thurmond and Kennedy and was developed over a two year period in cooperation with the Departments of State and Justice.[2] Identical provisions have also been included in the latest version of the Criminal Code Reform Act.[3] There are some 35 changes or clarifications of extradition law which would be affected by S. 1639.[4] Three provisions, however, are of special significance:

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[2] The text of the proposed legislation, correspondence from the Departments of State and Justice, and a detailed Memorandum on Extradition Legislation were published in the Congressional Record. 127 Cong. Rec. S9952 (daily ed. Sept. 18, 1981). A similar bill was introduced as a floor amendment to Chapter 32 of S.1722, the 1980 version of the Criminal Code Reform Act, in the waning days of the 96th Congress. See 126 Cong. Rec. S13233 (daily ed. Sept. 23, 1980).

[3] See S.1630, introduced at 127 Cong. Rec. S9769 (daily ed. Sep. 17, 1981).

[4] These changes include the following: Section 3191 recognizes that a U.S. obligation to extradite particular classes of offenders has been created by certain multinational agreements, such as the Hague convention, as well as by bilateral extradition agreements. Section 3192(d)(1) codifies standards for bail, permitting release only if the fugitive can demonstrate "special circumstances" warranting it. Section 3194(c) simplifies procedures for authentication of documents, while §3194(d) establishes that extraditability may be determined solely on hearsay and/or documentary evidence. Section 3196(a)(3) authorizes the Secretary of State to extradite U.S. nationals unless surrender is expressly prohibited by the applicable treaty, thus reversing the effect of Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5 (1936).

> Section 3195(a) permits a direct appeal of the extradition magistrate's findings to a U.S. Court of Appeals by either party;
>
> Section 3194(a) curtails jurisdiction of courts to determine whether the foreign state is seeking the extradition of the person for a political offense; and
>
> Section 3196(a)(3) delegates to the Secretary of State authority to deny extradition if he is persuaded, by written evidence and argument, that the "political offense" exception is applicable.

The merits of these changes are discussed below.

3195(a) -- Appeal

Section 3195(a) of the bill[5] corrects a long-standing anomaly in extradition procedure. The present extradition statute is silent as to any right of appeal from the decision of a magistrate regarding extradition, and several cases have assumed that direct appeal is not permitted.[6] Although the correctness of this assumption has recently been challenged by the Department of Justice in a case pending before the Second Circuit,[7] the present bill would firmly establish the right of appeal. Common sense supports this change.

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[5] Section 3195(a) states in part as follows:

> Either party may appeal to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal.

While a person found extraditable may seek collateral review through an application for a writ of habeas corpus, this method is cumbersome and indirect. However, the requesting state (or the U.S. Government acting on its behalf) has no right of review whatsoever, even where the decision not to extradite is based on purely legal grounds. It has been held that a new request for extradition may be filed by the Government before a different judge or magistrate,[8] but this procedure is both inefficient and unfair. It is inefficient because it requires repeating the ordeal of an often lengthy trial proceeding. It is unfair because the requesting state is denied any opportunity to have an erroneous interpretation of the law corrected by appellate judges who may be considered more experienced at legal analysis than are magistrates. In turn, an additional unspoken burden falls on the requesting state in a re-filing, because a second judge may be hesitant to alter the result previously reached by a brother or sister judge. In addition, there is a natural concern, first, about the unseemly appearance of "judge-shopping," and, second, about getting "two bites at the apple" even though there is no double jeopardy or res judicata issue involved.[9/] These two concerns militate against the Government's re-filing an extradition request that has once been denied.

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[6] See Collins v. Miller, 252 U.S. 364, 369 (1920); Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893); Shapiro v. Ferrandina, 478 F.2d 894, 901 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973).

[7] See Brief for Appellant, United States v. Desmond Mackin, No. 81-1324 (2d Cir.).

[8] See Hooker v. Klein, 573 F.2d 1360, 1365-66 (9th Cir. 1978); In re Gonzalez, 217 F.Supp. 717, 720 (S.D.N.Y. 1963).

The proposed legislation would remedy this situation in an equitable manner by permitting both sides an opportunity to seek review by direct appeal. While there is no direct appellate review of a probable cause determination in a preliminary hearing or a grand jury proceeding in the usual criminal case, there are several related situations in which direct review is available, such as the Government's appeal of a refusal to issue an electronic surveillance warrant[10/] or the Government's appeal of the dismissal of an indictment.[11/]

[9/] Hooker v. Klein, supra at 1367-68.

[10/] See Application of the United States, 563 F.2d 637 (4th Cir. 1977).

[11/] 18 U.S.C. §3731.

The bill itself does not describe the scope of review, but the accompanying Memorandum states that "[i]t is anticipated that review on appeal will be very narrow, and that any findings of fact by the lower court will be affirmed unless they are clearly erroneous."[12/] The U.S. Supreme Court has held that the nature of review of the extradition determination on a writ of habeas corpus is limited.[13/] It seems clear from these and other cases that this limited review flows more from the nature of the extradition proceeding than from the nature of the Great Writ. As one court has pointed out, "the extradition proceeding is not a trial of the guilt or innocence but of the character of a preliminary examination held before a committing magistrate to determine whether the accused shall be held for trial in another tribunal."[14/] Accordingly, on direct appeal from such a "preliminary examination" under proposed § 3195(a), a limited scope of review is appropriate.

[12/] 127 Cong. Rec. at S9957. Section 3195(c) of the proposed legislation also cuts off later habeas corpus review "unless the court finds that the grounds for the petition or appeal could not previously have been presented."

[13/] Fernandez v. Phillips, 268 U.S. 311, 312 (1925); Ornelas v. Ruiz, 161 U.S. 502, 508-09 (1896).

[14/] Jiminez v. Aristequieta, 311 F.2d 547, 556 (9th Cir. 1962).

3194(a) -- "Political Offense"

The most controversial provision of the bill is that part of §3194(a) which removes from courts jurisdiction over the "political offense" determination.[15] Virtually all extradition treaties contain a provision barring extradition for a so-called "political offense." Typical of the language of such a provision is that in Article V of the extradition treaty between Great Britain and the United States which states:

> (1) Extradition shall not be granted if:
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> * * *
>
> (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or
>
> (ii) the person sought proves that the request for his extradition has in fact been made a view to try or punish him for an offense of a political character.[16]

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[15] Section 3194(a) states in part as follows:

> The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable, unless the hearing is waived pursuant to section 3193. The purpose of the hearing is limited. The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

[16] 28 U.S.T. 227, T.I.A.S. No. 8468.

Traditionally, resolution of the issue of the possible political motivation of the extradition request -- under Article V(1)(c)(ii) of the U.S.-British treaty, for example -- has been within the exclusive province of the Secretary of State.[17] On the other hand, courts have routinely exercised jurisdiction over the political "offense" issue -- under Article V(1)(c)(i), for example -- since the decision in _In re Ezeta_ in 1894.[18]

The natural question is: Why exclude the judiciary from its long-standing role in the "political offense" determination? The answer lies in three recent extradition cases: _McMullen_, _Mackin_, and _Abu Eain_. These cases make clear that such a determination requires an exercise of expertise over subjects, and in a fashion, ill-suited to the judiciary. The results in the _McMullen_ and _Mackin_ cases are absolutely shocking, and the rationale of the _Abu Eain_ case -- even though its result is correct -- is ultimately just as frightening.

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[17] _See, e.g._, _In re Lincoln_, 228 Fed. 70, 73-74 (E.D.N.Y. 1915), _aff'd per curiam_, 241 U.S. 651 (1916); _Garcia-Guillern v. United States_, 450 F.2d 1189, 1192 (5th Cir. 1971); _In re Gonzalez_, 217 F.Supp. 717, 722 (S.D.N.Y. 1963).

[18] 62 Fed. 972 (N.D. Cal. 1894). _Accord, e.g._, _Ornelas v. Ruiz_, 161 U.S. 502 (1896); _Abu Eain v. Wilkes_, 641 F.2d 504 (7th Cir.), cert. denied, _____ U.S. _____ (1981); _Sindona v. Grant_, 619 F.2d 167 (2d Cir. 1980).

In the Peter McMullen case,[19] McMullen was charged with the bombing of a British army installation in England. In the Desmond Mackin case,[20] Mackin was charged with attempting to murder a British soldier dressed in civilian clothes, who had been standing in a bus station in Belfast. The magistrates in both of these cases denied extradition on the grounds that the offenses charged were "political offenses," emphasizing that the defendants were members of the outlawed Provisional Irish Republican Army (PIRA) and that their victims were British soldiers.

In the Abu Eain case,[21] an alleged member of the Palestinian Liberation Organization (PLO) was charged with planting a bomb which killed or injured several children in an Israeli resort town. On habeas corpus review, the Seventh Circuit upheld the magistrate's original determination that the "political offense" exception was inapplicable. The court appeared, however, to accept the proposition that acts which "disrupt the political structure of a State, and not the social structure" would be exempt.[22]

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[19] In the Matter of the Extradition of Peter Gabriel John McMullen, No. 3-78-1099 MG (N.D. Cal., filed May 11, 1979) (Woelflen, Magis.).

[20] In the Matter of the Requested Extradition of Desmond Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., filed Aug. 13, 1981) (Buchwald, Magis.)

[21] Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, ____ U.S. _____ (1981).

[22] Id. at 520.

These three decisions represent a grave danger to world public order. It is not so much that the United States will become a more attractive refuge for members of the PIRA, the PLO, the Beider-Meinhoff gang, the Italian Red Brigade, and other terrorists, though that is possible. Rather, the danger lies in the impact of these decisions overseas. They appear to place a stamp of approval on, and sanctify, terrorist activities of all kinds.

The proposed legislation is not an overreaction to these three cases. We are not dealing with some minor misinterpretations of Congressional intent, the kind that can be corrected by fine-tuning a statute to give the courts more guidance. Rather, these cases have set cruel precedents that can only make a violent world more violent, and have revealed a fundamental flaw in the structure of the decision-making process with respect to extradition, a flaw which justifies the jurisdictional remedy contained in S. 1639.

The United States has aggressively sought to gain international accord on a total rejection of political violence as an instrument of political change; however, the Mackin and McMullen decisions -- and to some extent the Abu Eain case -- have sent out a message to the world that the American judicial system accepts the notion that the end justifies the means and that political violence is an acceptable method of accomplishing political goals.

In each of these cases, the test set forth in the 19th century English case of In re Castioni[23] was accepted as the operative definition of a "relative" political offense. The court in Castioni stated that a political offense is a crime which was "incidental to and formed a part of political disturbances."[24] The absurdity and ultimate cruelty of applying this test of a political offense is illustrated by the assertion of the magistrate in McMullen who, taking the exception to its insane but logical end, stated "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from deportation [sic] if the crime is committed under these pre-requisites."[25] Mechanically applying the Castioni test, the magistrates in both Mackin and McMullen concluded that extradition was prohibited since "political disturbances" were taking place in Northern Ireland and the attempts by Mackin and McMullen to kill British soldiers were natural incidents of these disturbances.

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[23] [1891] 1 Q.B. 149. In Castioni, Switzerland sought the extradition of a man charged with murder. The death had occurred during a riot and appeared to have been more accidental than intentional. The court justified the decision not to extradite by stating that, after a civil war, "one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement." Id. at 167.

[24] Id.

[25] McMullen, supra at 3.

In the *Abu Eain* case, the U.S. Court of Appeals for the Seventh Circuit upheld extradition, concluding that the political offense exception did not apply; however, two points must be made. First, it is a shocking notion that the "political offense" exception is cut so far loose from any ethical mooring that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation struggle,"[26/] and that the political offense exception prevents extradition for such a crime. It was a sad spectacle to see a former Attorney General of the United States, representing Abu Eain, stand before the U.S. Court of Appeals for the Seventh Circuit and utter that bankrupt shibboleth of moral relativism, "one man's terrorist is another man's freedom fighter." Second, the court's application of the *Castioni* test in *Abu Eain* was ultimately just as mechanical as that in *Mackin* and *McMullen* and left the unmistakable impression that the court would have *denied* extradition if Abu Eain had directed his attacks at Israeli military

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[26/] The defense argued that for the P.L.O. to achieve its political purposes in Israel, it is necessary for it to engage in acts of violence, such as bombings in public places, since "an occupied people regards every occupier as part of the usurping state's political being." Petitioner's Brief in Support of Petition for Writ of Habeas Corpus, dated January 9, 1980, at 9.

or governmental officials.[27] Fortunately, the Seventh Circuit has recognized that the killing of children on the streets of a resort town does not constitute a "political offense," but its decision does not go far enough.

The court in Abu Eain fails to recognize that the nature of the "political offense" exception is such as to defy the creation of judicially manageable standards and inevitably to thrust courts into foreign waters, both literally and figuratively. A courtroom is not the proper forum for a debate over the political climate in a foreign country; yet, in order to apply the "political offense" exception, courts have been increasingly drawn into the most searching analysis of the social, political, and economic history of the foreign countries requestion extradition. Such an analysis leads to lengthy and time-consuming proceedings which delay extradition for months and even years. More importantly, it threatens a dangerous interference with the conduct of our foreign policy, as magistrates -- our lowest level of judicial officers -- make findings on political situations in foreign countries which are susceptible to misinterpretation and misuse abroad.

For example, in the Mackin case which began more than a year ago, the magistrate went far beyond the facts surrounding the alleged shooting incident and received testimonial and documentary evidence bearing on the entire history of English-Irish relations. After hearings on the political offense issue lasting seven days and consuming more than a thousand pages of transcript, the magistrate issued a 100-page opinion that discussed the political and historical heritage of Northern Ireland, a treatment of the religious underpinnings of the past and present disturbances there, references to supposed abuses by various governmental authorities, a lengthy discussion of the general level of violence in Northern Ireland, a description of British legal procedures for the prosecution of suspected terrorists, and an assessment of the support for IRA activities within the Catholic community at large.[28/]

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[27] See 641 F.2d at 520-21, 522-23.

The potential detriment to our relations with the United Kingdom as well as the danger of interference in the domestic political affairs of another country from this sort of proceeding is very real. Indeed, it appears that the magistrate's opinion in Mackin was widely circulated in Northern Ireland on behalf of the "hunger strikers" in British custody who sought to be recognized and treated as "political" offenders, thus inflaming an already tense situation.[29/]

[28/] See Mackin, supra at 40-74.

[29/] See Brief of Appellant, United States v. Mackin, No. 81-1324 (2d Cir.) at 32.

Moreover, the Castioni test -- the definition of a "political offense" used by the courts in Mackin and the other recent cases -- seriously misinterprets the "political offense" exception. From a study of the dozen or so cases in Anglo-American jurisprudence which deal with the political offense exception, it seems fair to conclude that there has been a fundamental misunderstanding of the nature and purpose of this treaty provision extending back as far as the 1890s.[30/]

The "political offense" exception began appearing in extradition treaties in the mid-19th century. Unfortunately, its origin and purpose have never been effectively studied by historians or legal scholars.[31/] This may be due to the absence of any readily-available documentation of the intent of the Executive Branch or the diplomats who negotiated these treaties, like the legislative history accompanying Congressional enactments. Although a number of law review articles have discussed the "political offense"

[30/] For a discussion of the older cases as well as McMullen and Abu Eain, see Hannay, "International Terrorism and the Political Offense Exception to Extradition," 18 Col.J. Trans. L. 381 (1980).

[31/] Cf. "[The] most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it." 1 Blackstone, Commentaries 61 (8th ed. 1778).

exception,[32] none of them have deeply researched 19th century English or American materials to determine whether the Castioni test and recent interpretations of it are in fact compatible with the intent of the treaty draftsmen. Nor have the courts in the relatively few English and American cases dealing with the "political offense" exception ever approached their interpretive task from this perspective. Later courts have repeated the statements of earlier courts without once questioning their fundamental validity.

The shocking results in McMullen and Mackin and the implications of Abu Eain suggest that much of what has previously been written about the "political offense" exception by courts is misleading or just plain wrong. The error may be accounted for, as follows: the "right" result in the early cases may have seemed so obvious or have been reached so intuitively that courts were lulled into accepting the first "test" that fit the facts without giving much thought to its ramifications. Ironically, the results in every case until recently suggest that the courts, despite their purported reliance on such a test, were actually engaged in making political judgments about who should or should not be granted asylum.[33] While this is the approach that the proposed legislation would have the Secretary follow, it is not an approach appropriate to courts, nor is it the approach that the courts claimed to be following. Rather, in the process of making these political judgments, courts continuously uttered generalized pronouncements about the definition of a "political offense" that have come back to haunt them and trap us on a road that leads only to more political violence.

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[32] E.g., Lubet & Czackes, "The Role of the American Judiciary in the Extradition of Political Terrorsts," 71 J. Crim. L. & Crim. 193 (1980); Epps, "The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence," 20 Harv. Int'l L. J. 61 (1979); Carbonneau, "The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created," 1 A.S.I.L.S. Int'l L. J. 1 (1977); Bassiouni, "Idealogically Motivated Offenses and the Political Offenses Exception in Extradition," 19 DePaul L. Rev. 217 (1969); Garcia-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law," 48 Va. L. Rev. 1226 (1962).

No court has ever questioned whether an all-encompassing, objective "test" is appropriate. Yet the "test" formulated by Anglo-American courts in the 1890s is in fact based on assumptions which, when extended to their logical conclusion, seem fundamentally at odds with the likely intent of the treaty draftsmen and our present beliefs. As modern courts carefully and conscientiously applied the letter of this earlier case law, absurd and dangerous results have become more frequent and the divergence from the intent of the treaty writers has become more and more apparent.

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[33] See United States v. Artukovic, 170 F.Supp. 383 (S.D. Cal. 1959); Ramos v. Diaz, 179 F.Supp. 459 (S.D. Fla. 1959). These cases can only be explained as efforts by the courts to avoid cooperating in any way with Communist regimes that they did not approve of.

The law that matters is of course to be found in what courts do, not in what they say, and the proper application of the "political offense" exception is at variance with the formulation unquestioningly repeated by modern American courts. Neither before, during or after the decisions which run from In re Ezeta to In re Mackin, have the considerations in making a "political offense" determination been as simplistic as these cases have indicated. There is no universally-accepted definition for a "political offense." Certainly, other countries do not accept the mechanical Castioni test.[34] The reason for

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[34] See, e.g., Ruling on the Requests for the Extradition of Tomas Linaza-Echevarria, No. 577-81 (Court of Appeals of Paris, filed June 3, 1981), reprinted in Dept. of State, Div. of Language Services, Translation No. 81/16601. There, the Chambre d'Accusation of the French Court of Appeals upheld the extradition of Linaza-Echevarria, a reputed Basque terrorist, for the murders of an alderman and six members of the Civil Guard in Spain. The fugitive claimed that the acts with which he was charged "were perpetrated as part of the struggle for political autonomy waged by a segment of the population in the Basque provinces of Spain." Id. at 8. The court rejected this claim, stating:

> Irrespective of the objective sought or possible context, most of these offenses are too serious to be regarded as having a political character or as being related to a political offense.

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this lack of uniformity is clear: no all-encompassing definition is possible. Indeed, there ought _not_ to be one, for an iron-clad definition would inhibit the very flexibility that the treaty provision was originally designed to foster.

These has been some recent criticism of the proposal to remove jurisdiction over the "political offense" exception from the courts on the ground that the constitutional rights of the fugitive will be violated. Such criticism misses the mark. Procedurally, the fugitive has no due process right to any judicial participation in the extradition decision.[35] Indeed, it is possible that even a judicial probable cause hearing could be dispensed with, if Congress saw fit.[36]

It is also misleading to talk of the fugitive's substantive rights. The "political offense" exception --

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> The less serious acts cannot be disassociated from the others, for their either contributed to their perpetration or were the immediate consequence thereof.
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> By reason of the means employed, these acts are all too serious in nature to be covered by the non-extradition exception.... [Id. at 8-9]

[35] _See Fong Yue Ting v. United States_, 149 U.S. 698, 714 (1893).

[36] _Cf. Williams v. Rogers_, 449 F.2d 513, 522-23 (8th Cir. 1971)(Status of Forces Agreement).

like the concept of political asylum -- is not a recognition of some inalienable right of the fugitive. He has no right to commit crimes in another country and escape extradition merely because the offenses were committed with a political purpose. The right involved is that of the state which has an interest in being able, when it deems it appropriate, to give political asylum for humanitarian reasons or, more generally, to refuse to become involved in domestic political disputes.

As extradition treaties became prevalent in the 19th century, democratic nations undoubtedly found themselves facing the unpleasant task of sending a political dissenter or activist back to a tyrannical regime to stand trial for acts which they did not perceive as "criminal" in any ethical or moral sense. Through the mechanism of the "political offense" exception, a conflict between the affirmative obligation to extradite under a treaty and the desire to grant political asylum was avoided. The fugitive newspaper editor charged with sedition or the fugitive poltical candidate charged with treason merely for expressing their opinions could be sheltered from extradition for these "pure" political offenses, the sort of offense directly implicating cherished democratic values. In addition, the fugitive dissident charged with criminal trespass during a protest or rally could be sheltered for his "relative" political offense, the sort of offense that smacks of a "trumped up" charge.

In addition to, and apart from, its function of sheltering those whose only crime was speaking out, the "political offense" exception surely developed as a useful mechanism by which states could avoid becoming entangled in the internal political upheavals of other nations. Through the exception, they could avoid being forced to favor one side over another during uncertain civil wars or being compelled to assist the winners wreak vengeance on the losers after some political coup.

The circumstances in which a state should refuse to cooperate with injustice by sending a dissident back for certain persecution or refuse to allow the mechanism of extradition to be used for mere vengeance simply cannot be defined, however. Just as it is impossible to identify or codify all of the circumstances under which asylum should be granted or denied by a nation, so it is impossible -- and ultimately improper -- for a court to try to define what constitutes a "political offense" by means of some hard and fast rule or test. To do so misconstrues the very nature and purpose of that treaty provision. The "political offense" exception was created to give the requested state flexibility in responding to extradition requests, not to take it away. Instead of allowing our government to serve the needs of humanitarian policy or to adopt a "hands off" policy towards foreign political disputes when it wishes, the *Castioni* test has become a destructive device forcing lower level judicial officers to insert themselves into the heart of such political disputes. Rather than preserving justice and freedom, we find ourselves unable to help democratic governments defend themselves against brutal and inhumane acts. Rather than keeping hands off, we find ourselves forced to take the side of terrorists who are systematically destroying free society.

It is wholly unlikely that a study of 19th century diplomatic sources would corroborate the view that the "political offense" exception was intended as a recognition of some absolute and unqualified "right to rebel." Despite broadly phrased statements by philosophers such as John Stuart Mill[37] and by some of our founding fathers,[38]

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[35] J. Mill, *On Liberty* 2 (A. Costell ed. 1947) ("political liberties or rights which it was to be regarded as a breach of duty in the rule to infringe, and which, if he did infringe, specific resistance, or general rebellion, was to be held justifiable").

[36] Thomas Jefferson, Letter to James Madison (Jan. 30, 1787) ("I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical"); Abraham Lincoln, First Inaugural Address ("Whenever [the people] shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it").

democratic nations have never accepted the principle that any politically-disaffected group anywhere can take up arms for the purpose of replacing the existing government and be protected from extradition for common crimes of violence. Yet, only that dubious principle could justify the absolute and unqualified immunity from extradition seemingly conferred on violent revolutionaries by the *Castioni* test, the sort of immunity that precludes extradition "[e]ven though the offense be deplorable and heinous."[39]

Such a conclusion could never have been intended by those who negotiated our extradition treaties. What possible value could be thought to accrue to this country or to the international legal order in general from a rule that prevents the extradition of any and all who use political violence to achieve political ends? Encouraging revolution *qua* revolution is not now -- if it ever was -- an American national policy. The "political offense" exception exists for valid purposes, but those purposes are not served by an inflexible formulation like the *Castioni* test that draws no distinction between good ends and bad, fair means and foul.

Courts are accustomed to developing tests, rules, or formulas to resolve disputes -- pegs on which to hang

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[37] *McMullen*, *supra* at 3.

their decisions -- pigeonholes into which to sort their cases. Applying hard and fast rules to foreign affairs, however, is like trying to shove a square plug in a round hole; nothing fits. Foreign affairs is one of those situations where courts should refrain from involvement because a meaningful test or rule simply cannot, indeed should not, be established. These are situations in which the exercise of political judgment is called for; where the risks of damage that may result from inhibiting the exercise of discretion and flexibility by imposing some unbending rule are too great. This principle in part lies behind the constitutional delegation of foreign affairs to the Executive Branch, and the determination of what constitutes a "political offense" within the meaning of our extradition treaties logically falls within that delegation.

The "political offense" determination calls for sensitive judgment and should be made solely by the executive authority rather than the courts. Indeed the Supreme Court long ago recognized that only the Executive Branch has the ability to determine the political conditions which exist in a foreign country, including whether or not a state of war, belligerency, or insurrection exists at a particular time.[40/]

[40/] See In re Cooper, 143 U.S. 472, 499 (1892); The Three Friends, 166 U.S. 1, 63-66 (1897); Underhill v. Hernandez, 168 U.S. 250, 253 (1897).

A misapplication by some magistrate in New York or San Francisco or Peoria of an ill-advised "political offense" test can result in giving a terrorist, in effect, political asylum and can -- indeed almost surely will -- have a dangerous impact on an already unstable world. The October 6, 1981 assassination of Egyptian President Anwar Sadat serves as a brutal reminder that terrorism is alive and well and spreading.

Had the assassins of President Sadat fled to this country, it could plausibly be argued that the Castioni test was met since there were violent "political disturbances" going on in Egypt between Moslem fundamentalists and the government and the murder of President Sadat -- who was wearing a military uniform at the time of his death -- appears to be "incidental" to those disturbances. Judging by the literal-mindedness of the magistrates in Mackin and McMullen and the Court of Appeals in Abu Eain, such an argument might even prevail.[41] Yet reason and logic and a sense of human decency should cry out against that result.

The political offense exception could never have been intended to provide blanket immunity and asylum to every politically disaffected individual who in the company every politically disaffected individual who in the company of a few others of like mind wishes to take the law -- and a gun -- into his own hands. Where the institutions of democratic governance exist as they do, for example, in Northern Ireland, it ill-serves the interests of those who live in a free and open society to cast a cloak of protection over impatient extremists who demand their own way now and will kill anyone that stands in their way -- whether policeman, politician, soldier, or civilian. There is no rule of international law that sanctifies political murder merely because the victim wears a uniform. There is no open season on soldiers, nor should the city streets and village lanes of a democratic nation be considered a war zone merely because there are a hundred terrorists rather than one.

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[41] Similarly, if the IRA bombers that assassinated Lord Louis Mountbatten (see Wash. Post, Aug. 28, 1979, at A1, col. 1) had fled to the United States, the rationale of Mackin and McMullen would surely have prevented their extradition.

The test applied by the magistrates in McMullen and Mackin was the same as that applied by the Seventh Circuit in Abu Eain and by other courts reaching back to Castioni. Yet the ramifications of such a test have never been clearly seen until now. There is no good reason to continue the unquestioned repetition of the Castioni test, for it more often leads courts away from the right result than towards it. Even England does little more than pay lip service to it. After enunciating the rule, the English court had to read it in an absurdly literal fashion to avoid a more absurd result in the Meunier and Cheng cases and ignored it altogether in deciding the Kolczynski case.[42/] The English courts' struggles with the court-created burden of the Castioni test bear witness to the political and ethical complexities of this area and support the conclusion that the political offense determination is better handled in the alchemical laboratory of the diplomat who can balance such complexities without the obligation to enunciate or follow some immortal "test." Courts, of course, have no monopoly on justice or fairness, and their reliance on concrete "tests" may well prevent their reaching a just result.

This is not to say that the members of our judiciary are heartless or are supporters of terrorists. They plainly are not. Judge Harlington Wood's opinion in Abu Eain, for example, is eloquent in its denunciation of the barbarous acts of terrorists.[43/] But it is important to recognize that courts are inevitably limited by their necessary reliance upon rules and tests and that, in the area of foreign affairs, particularly in an area as dangerous

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[42/] In re Meunier, [1894] 2 Q.B. 415; Regina v. Governor of Pentonville Prison ex parte, Tzu-Tsai Cheng, [1973] 1 All E.R. 935 (Q.B.), aff'd, [1973] 2 All E.R. 204 (H.L.); Regina v. Governor of Brixton Prison ex parte Kolczynski, [1955] 1 All E.R. 31 (Q.B.).

[43/] 641 F.2d at 520.

as political violence, courts cannot as a practical matter -- and should not as a policy matter -- exercise the sort of political discretion and flexibility which is needed to reach the appropriate result in particular situations. There *is* no test or rule which meaningfully defines a "political offense." The *Castioni* test certainly does not. Nor should Congress try to fashion one. That is not the right approach with respect to our extradition statutes.

To be sure, discrete types of crimes can be singled out as exceptions to the "exception," as crimes which are *not* political offenses. This is the approach that has been taken in the Tokyo,[44] Hague[45] and Montreal[46] conventions with respect to aircraft hijacking and that the Council of Europe has taken in the 1977 European Convention on the Suppression of Terrorism.[47] So too can individual types of victims be singled out for protection. This is the approach that the United States and other countries have taken in their efforts to control terrorism internationally through the Internationally Protected Persons

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[44] 20 U.S.T. 2941, T.I.A.S. No. 6768 (effective Dec. 14, 1969).

[45] 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

[46] 24 U.S.T. 565, T.I.A.S. No. 7570 (effective Jan. 26, 1973).

[47] 15 Int'l Legal Mat'ls 1272 (1976); 16 Int'l Legal Mat'ls 233 (1977).

(IPP) Convention[48/] and, most recently, the Hostage Convention.[49/] But this is not the approach we should take at home.

Internationally, we may have to bargain with the Third World, haggling over the interplay between the reality of terrorism on the one hand and their concepts of the right of revolution, self-determination, and wars of national liberation on the other. Internationally, we may have to spell out each non-political offense in order to hedge the discretion of other countries and keep them from improperly refusing to extradite terrorists.

At home, there is nothing to be gained by tinkering with some all-encompassing new test or rule that must inevitably limit our flexibility and that may lead to results as shocking and as perilous as those flowing from the Castioni test. Any general test is bound to be either overinclusive or underinclusive; a statute enumerating offenses which either are or are not "political" will surely be incomplete and probably useless in most cases. Instead, the "political offense" question should be resolved solely by the Executive Branch in the unreviewable exercise of

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[48/] 28 U.S.T. 1975, T.I.A.S. No. 8532 (effective Feb. 20, 1977).

[49/] U.N. Doc. A/RES/34/146 (adopted Dec. 17, 1979). Ratified by the United States on July 30, 1980. _____ Cong. Rec. _____.

its discretion. As a nation, we have always entrusted to the Secretary of State's discretion with respect to the possible political motivation of the foreign state's extradition request which is also a treaty "exception".[50/] There is no good reason not to entrust to his discretion with respect to the equally "political" question of the nature of the offense.

3196(a) -- Responsibility of the Secretary

Section 3196(a)(3) of the bill[51/] specifies that the Secretary of State may decline to order the surrender of the person if he is persuaded, by written evidence and argument, that extradition is sought for a political offense or with a political motivation. The procedures envisioned

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[50/] E.g., In re Lincoln, 228 Fed. 70 (E.D.N.Y. 1915), aff'd per curiam, 241 U.S. 651 (1916).

[51/] Section 3196(a) states in part as follows:

> If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter, may --
>
> * * *
>
> (3) decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

by this section are reasonable ones. It is envisioned that any evidence or argument the fugitive wishes to present will be in writing; in other words, the Secretary is not obliged to provide a formal hearing for a fugitive who claims the benefit of the "political offense" exception.[52]

It has long been recognized by Congress that an adversarial administrative hearing is not appropriate "to the extent that there is involved ... the conduct of ... foreign affairs functions."[53] Moreover, courts have recognized that an adjudicatory hearing before the Secretary on the propriety of a fugitive's extradition is not required as a matter of due process right.[54] With respect to the political offense determination, there is no need for the sort of long, drawn out hearing involving live testimony on the history of a foreign nation that characterized the Mackin, McMullen and Abu Eain cases. Sufficient expertise and knowledge to resolve that sort of issue must be presumed to reside in the State Department already. Indeed, a major benefit and purpose of the proposed legislation is to avoid such a hearing.

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[52] See 127 Cong. Rec. at S9957.

[53] See Administrative Procedure Act, 5 U.S.C. § 554(a)(4).

[54] See Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1977).

An extended proceeding could itself have a deleterious effect on our foreign affairs by forcing the Government to take a public position with respect to the political situation in other countries and permitting alleged terrorists to use the opportunity for propaganda purposes. The extradition process, which is of course collateral to the merits of the charges, should be as expeditious as possible as a matter of fairness to both the requesting state and the accused fugitive.

The detailed Memorandum accompanying S.1639 also indicates that the Secretary's decision with respect to the political offense exception and the requesting state's motivation "is discretionary and will not be reviewable by the courts."[55/] Such a statement should, but may not, be sufficient to preclude judicial review.

The presumption of reviewability of agency action is so strong that a preclusion of judicial review of the Secretary's determination of the "political offense" issue will not readily be inferred when the statute is silent. Only if the legislative history clearly reflects deliberate Congressional intent to limit jurisdiction[56/] or if long-

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[55/] 127 Cong. Rec. at S9957.

[56/] E.g., Schilling v. Rogers, 363 U.S. 666 (1960) (no review of action under Trading with the Enemy Act); Chen Chaun-Fa v. Kiley, 459 F.Supp. 762 (S.D.N.Y. 1978) (no direct review of denial of political asylum).

standing precedent and Constitutional principles justify preclusion[57] will review be cut off.

In light of the explicit withdrawal of jurisdiction from the extradition magistrate in § 3194 and the long history of judicial review of the "political offense" issue, it would be wise to expressly state Congressional intent to commit the matter solely to the Secretary's unreviewable discretion. This might be accomplished by adding at the end of § 3196(a)(3) the following sentence:

> The decision of the Secretary with respect to these matters shall be final and conclusive, and on court of the United States shall have power or jurisdiction to review any such decision.

Preclusion of judicial review of the Secretary's decision with respect to the "political offense" exception would accord with current practice which precludes review of the Secretary's decision with respect to the political motivation of the extradition request.[58] Explicitly precluding such review will prevent the political offense issue from coming before the courts through the "back door" of a habeas corpus petition or by way of mandamus, when Congress has taken pains to forbid its entering the "front door" in the original extradition hearing.

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[57] *E.g.*, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (discretion of Attorney General as to visas); *Pena v. Kissinger*, 409 F.Supp. 1182 (S.D.N.Y. 1976) (consular non-reviewability).

[58] *See* Note, "Executive Discretion in Extradition," 62 Col. L. Rev. 1313, 1323 (1962).

CONCLUSION

The proposed legislation, S.1639, is an important improvement in U.S. extradition procedures and anti-terrorism effects. In the past decade, as international acts of violence by extremists of both the political left and right have accelerated, the traditional mechanisms for preserving world order have come under severe strain. One such mechanism is extradition. Efforts to extradite criminals for terrorist acts in a violent and rapidly changing world have led some courts to misinterpret the "political offense" exception to extradition, distorting it into an amoral sword that cuts at the philosophic underpinnings of modern democratic society and threatens the Rule of Law itself.

As a nation, we are trying as best we can to assist in international efforts to guide the world away from violence and towards peace. We are seeking to exercise what influence we can to help other nations establish justice, insure domestic tranquility, and secure the blessings of liberty. Those efforts require the exercise of judgment and sense. Balancing one interest against another and making decisions that may ultimately affect the fate of millions of people and the destiny of nations is a delicate task, even for diplomats. Inevitably, mistakes will be made, but those mistakes should be chargeable to the branch entrusted with the conduct of foreign affairs, not to the judiciary, and certainly not to mere magistrates.

Determining what is or is not "just" violence deserving of America's protection and in turn exemption from extradition as a "political offense" is a matter of applying ethics and morality and politics in each case, not some hard and fast rule. That determination should firmly rest with the Executive Branch.

— W.M.H.

The **Chairman**. I believe those are all the witnesses we have today.

Senator Grassley, did you have questions?

Senator **Grassley**. I have no questions, Mr. Chairman.

The **Chairman**. If there are no questions from members of the committee, we stand adjourned.

[Whereupon, at 3:30 p.m., the committee recessed, to reconvene at the call of the Chair.]

THE SECRETARY OF STATE
WASHINGTON

August 25, 1981

Dear Mr. Chairman:

Thank you for your letter of July 7 asking for my views on the proposed "Extradition Act of 1981."

Your letter notes that the proposed legislation was worked out over the last several years by the staffs of your Committee, the Department of Justice, and the Department of State. I understand that these efforts to modernize and improve United States extradition law drew heavily on court decisions, recent treaty developments, and practical experience with the ever-increasing number of extradition cases.

The Department of State is particularly pleased with the provisions of the bill which provide more effective federal control over filing of extradition requests in this country (section 3192); which for the first time permit appeal from a district court's decision on an extradition request (section 3195); and which place in the Secretary of State the determination whether extradition should be refused on political offense grounds (section 3196(a)(3)). Taken together, these provisions should reduce the risk of adverse foreign policy consequences which flow from extradition either improperly initiated or improperly refused. At the same time, every effort has been made to preserve the protection of individual rights.

New legislation of this kind will be tremendously important in enabling the Departments of Justice and State to carry out their increasing treaty responsibilities in this area more effectively, and I therefore endorse it.

Sincerely,

Alexander M. Haig, Jr.

The Honorable
Strom Thurmond,
Chairman,
Committee on the Judiciary,
United States Senate.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 04 1981

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in reference to your letter of July 7, 1981, requesting the views of the Department of Justice on your proposed bill to modernize and improve the United States' laws governing the implementation of our extradition treaties with other countries. As you note, this bill was originally introduced by you, Senator Kennedy and Senator Hatch in the past session of Congress as an amendment to the proposed federal criminal code. It was developed jointly by the staffs of the Committee, the Department of Justice and the Department of State. The Department of Justice strongly supports this bill.

The present provisions of Title 18 of the United States Code governing the implementation of our extradition treaties were originally enacted in the 1840's and 1880's, and have not been materially changed since their enactment. They were designed to deal with transnational criminal activity in an era when the United States was largely geographically insulated from such activity. During that era few requests were ever made by the United States or our treaty partners for the extradition of fugitives. The present provisions are not capable of adequately dealing with extradition problems in the world of intercontinental jet air transport and high-speed telecommunications -- a world in which we are no longer geographically protected from transnational criminal activity. Over the past decade we have witnessed a more than ten-fold increase in the volume of extradition requests made by and to the United States.

The proposed bill also should be helpful in the United States' efforts to curb violent crime, narcotics trafficking and terrorism. In the past two and one-half years almost one-third of the extradition requests made by or to the United States have sought the extradition of persons accused or convicted of crimes of violence. Another third have sought the extradition of persons accused or convicted of narcotics trafficking. A significant number of such requests have related to persons accused of terrorist-related activity.

The substantial improvements made by the proposed bill will greatly enhance the United States' ability to deal with the significant increase in transnational criminal activity. At the same time, it will set forth clearly the procedural safeguards to be afforded fugitives from foreign charges arrested in the United States. The proposed bill will convert our present horse-and-buggy era extradition laws into ones capable of dealing with international fugitives in today's world.

For the above reasons, we believe that it is very important that the proposed bill be enacted.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

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October 5, 1981

Senator Strom Thurmond
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Attention: Paul Summit
Special Counsel

Re: S.1639 Extradition Act of 1981

Dear Senator Thurmond:

At the suggestion of Mr. Paul Summit, I am writing to express my opinion on S.1639. I feel that I am in a unique position to comment on the proposed extradition act since I have, as a Federal Public Defender and an attorney in private practice, represented the accused in numerous international extradition proceedings. In particular, I represented the accused in In re McMullen, No. 3-78-1099 MG (N.D. Cal. 5/11/79), where I successfully argued the application of the political offense exception to bar the extradition of a former member of the Provisional Irish Republican Army. (See Congressional Record, S.9959, fn. 61 9/18/81 discussing the McMullen decision.)

My comments on S.1639 arise from my expertise in international extradition litigation. However, I appreciate the concerns of the executive branch which have motivated introduction of this bill. There is no question that international extradition procedures in federal court should be modernized. There is also no doubt in my mind that the federal courts are fully competent to decide all issues (including the application of the political offense exception) heretofore within the jurisdiction of federal courts in international extradition proceedings.

Since the bill proposes numerous changes in international extradition procedures, I will comment on them in the same order as they appear in the bill. I will not comment on most of those sections which I believe make no significant change in the law (i.e., simply bring the statute in conformity with the case law) or which involve relatively insignificant and basically neutral procedural details.

§3192(2) -- My main concern with §3192(2) is that the Justice Department may engage in forum shopping by claiming that an accused's whereabouts are unknown when, in fact, the evidence may indicate the contrary. Some alteration of this section should be made to allow for a change of venue to the district where the accused was residing or arrested, upon an adequate showing by the accused that the appropriate law enforcement agency or foreign government knew, or had reason to know, that the accused was in fact residing in a particular place. It must be remembered that many persons who are the subjects of international extradition requests to the State and Justice Departments are United States citizens, rather than foreign citizens who may in certain circumstances truly be considered to be fugitives from justice. It would be, in my opinion, unreasonable to provide no judicial authority for a change of venue (or, more accurately, multiple venue) in extradition proceedings where the accused can make an adequate showing concerning residency in another district.

§3192(c) -- The arrest or summons provision is a very sensible change in extradition law, and will obviate the need for protracted bail hearings in many cases.

§3192(d)(1) -- Codification of a recognition of a right to bail under "special circumstances" is preferable to the present ambiguous state of the case law. However, the bill's commentary on section (d)(1) (Congressional Record at S.9955) suggests an unreasonably stringent test for "special circumstances". The accused is often either an American citizen or a foreign national living and working openly in this country. Those persons have, in my experience, far less motivation to fail to appear for court hearings than defendants in ordinary criminal cases because: (1) they are trying to convince a judge not to order them extradited to a foreign country. The best way an attorney and his client can convince a judge of the accused's basic trustworthiness is to make sure the accused appears in court as ordered; (2) bail conditions in extradition cases always entail surrender of passports or other travel documents, making unauthorized departure from the country extremely difficult; (3) particularly in the case of United States citizens or foreign nationals living here legally, there is no motive to flee the country, since those persons will be unable to live or work in most other countries without immediate detection and, oftentimes, very minimal extradition protections.

§3193 -- The waiver of extradition hearing provisions and the other parts of this section are a valuable means for handling those cases where the accused does not wish to litigate. The Justice Department and the demanding country ought to have some right to express disapproval of such a waiver. However, the federal court should have the power to decide independently if the refusal of the Attorney General or the demanding country is made in good faith. If the court is not satisfied with the reasons for the objections to the waiver, the court should be able to accept the waiver nonetheless and certify the accused's extraditability. Thereafter, if the demanding country, the Attorney General and the State Department fail to meet their respective obligations concerning the delivery of the accused, the court which originally heard the extradition matter, or any other court with jurisdiction, should have the power to re-open the case and either issue a writ of habeas corpus or rescind its original certificate of extraditability which was based on the waiver.

§3194(a) -- This section, which removes the jurisdiction of federal courts to decide the political offense exception defense is, in my opinion, totally misguided and probably unconstitutional. My criticism of

§3194(a) does not arise from the fact that I am one of the only lawyers who has ever successfully asserted the political offense exception in an extradition case. My criticism also does not arise from any particular sympathy for the political philosophy of persons or groups in foreign countries who have in the past asserted the defense in an international extradition proceeding in the United States. My criticism certainly does not arise from any personal approval of the acts of persons who can properly be characterized as terrorists, since I am appalled by the killing or injuring of innocent persons when such acts are committed in the name of a political movement but carried out in the spirit of anarchy.

Nonetheless, the Justice Department's assertion that successful use of the political offense exception in cases such as In Re McMullen will make the United States more attractive for members of the "IRA, the PLO, the Beider-Meinhoff gang, the Italian Red Brigade, and other terrorists" (Congressional Record, S.9959, fn. 16) is patently absurd. There is, of course, no evidence which remotely suggests that members of those groups (whether or not those groups are all correctly lumped together by the Justice Department) have fled to the United States to avoid criminal prosecution in their own countries. Indeed, the absence of United States extradition cases involving Beider-Meinhoff or Italian Red Brigade members, and the successful extradition of PLO member Ziyad Abu Ein (79 M175, N.D. Ill. 12/18/79), suggests that the rare successful assertion of the political offense exception has had absolutely no effect upon the small population of genuine international terrorists

However, my criticism of §3194(a) goes well beyond the rather transparent Justice and State Department assertion discussed above. Of equal importance is the fact that the commentary to the bill utterly fails to explain why the courts are any less competent than the executive branch to decide the political offense exception. The courts in this country have over the past one hundred years or more evolved workable standards governing the political offense exception. Application of those standards by the federal courts may not always lead to a result of which the executive branch or the demanding country approves. However, as long as the courts are to have jurisdiction over any areas of international extradition proceedings and provide the accused with the degree of due process which is constitutionally required in extradition proceedings, that jurisdiction must extend to include the power to decide a political offense exception claim.

Perhaps the most obvious reason for the need to retain federal court jurisdiction is contained in the second paragraph of commentary to §3194(a), at Congressional Record S.9956. That paragraph states the political offense claim "is not the kind of issue which lends itself to resolution through the judicial process", that there are few "truly objective criteria" for measuring the claim, and that the decision on such a claim is "inexplicably intertwined with the conduct of foreign relations" and, therefore, "best left to the executive branch to decide." The Justice and State Departments should be complimented for their candor in making these assertions, but certainly should not be rewarded for that candor by enactment of §3194(a)

Simply put, each assertion quoted above is fundamentally wrong. First, as I previously noted, the judicial process has been resolving political offense exception claims in international extradition cases since those cases were first brought in federal court. Second, whether the judicial standards are "truly objective" either in theory or practice is clearly irrelevant since the executive branch -- by its own admission in both the second and the third paragraphs of the commentary to §3194(a) -- would not be "truly objective" in its application of whatever standards it chose to use, and would take into very great account the adverse impact that its acceptance of a political offense claim would have upon its relations with the demanding country.

Furthermore, it is naive to assume that courts are unaware of the impact of their decisions on political exception claims in international extradition cases will have on foreign relations. In those recent cases where the defense has been asserted, briefing by both the accused and the Justice Department has been exhaustive. The question of the impact that an extradition decision will have on foreign relations has been repeatedly briefed and argued by Justice Department attorneys during extradition hearings. The success of the Justice Department in litigating extradition cases suggests that the courts have not been insensitive to the foreign relations issue.

A final and, in my opinion, obvious flaw exists in §3194(a). Assuming arguendo that the court's jurisdiction to decide political offense exception claims can be abrogated, it seems to me that as a matter of fundamental due process there would have to be some judicial review, presumably via habeas corpus proceedings unrelated to the new appeals provision of the statute, of an executive branch decision to deny a political offense claim. If the executive branch decision on this issue is judicially unreviewable (the commentary at S.9957, so indicates and also states that the State Department would not have to provide the accused with a "formal hearing" on his political offense claim), then there is no way for an accused to be guaranteed any procedural or substantive fairness in the executive branch's review of a political offense exception claim.

Two final comments on §3194(a). While the courts repeatedly refer to international extradition proceedings as "sui generis" or "quasi-criminal", the reality of such litigation is that everyone (i.e. judge, prosecutor, defense counsel, the accused and the public) recognizes the proceedings to be criminal. The underlying charges are, of course, criminal and the hearings themselves are roughly similar to a preliminary hearing in a criminal case. The consequences of the proceedings are drastic and will result in the dispatch of the accused to a foreign country where the legal system is frequently unlike our own and where the questions of legal representation, contact with family and friends, and other important matters are often either unresolvable or indeterminable. The federal courts must now, as they have in the past, protect the rights of the accused fully to assure that no person is subjected to improper extradition simply because extradition may be politically expedient. I submit that §3194(a) unjustifiably precludes the courts from guaranteeing that the accused will be protected from unreviewable executive branch decisionmaking which may be motiviated by political expediency.

Finally, I submit that if the Committee or the executive branch is dissatisfied with the present definitions or applications of the political offense exception in the courts, it is the job of the Justice and/or State Department to convince the courts to reformulate or modify either the standards or the application of the standards to particular offenses.

§3194(2) -- The Commentary to this section argues for continuation of present case law standards allowing the accused to introduce "explanatory" evidence but not evidence "contradicting" that submitted by the government. I feel that these case law distinctions are virtually meaningless and are rather frequently disregarded by the triers of fact. However, I can see no purpose in trying to define those terms more accurately in the statute.

§3195 -- It is my understanding that the question of the government's right to appeal a magistrate's decision denying a certificate of extraditability is presently pending before the Second Circuit in United States v. Desmond Mackin, No. 81-1324 and 81-3064. Until that issue is resolved by the Second Circuit, I feel that my comments on the appeal issue would be premature. As I previously noted, the elimination of habeas corpus review is unacceptable if it bars habeas corpus review of a State Department decision rejecting a political offense claim, assuming the statutory provisions of §3194(a) were enacted. As I read the Commentary at S.9957, concerning §3195, the Executive Branch intends that such decisions by the Secretary of State "will not be reviewable by the courts". For the reasons I have previously stated, if jurisdiction to decide the political offense exception is removed from the courts as proposed by §3194(a), I consider that portion of §3196 to be misguided and probably unconstitutional.

I commend the efforts to modernize international extradition proceedings reflected by certain sections of S.1639. However, as one of the only defense attorneys who has handled a number of international extradition cases, I am deeply concerned that certain provisions of this bill -- most notably §3194(a) -- will place within the Executive Branch an unacceptable degree of power to decide the fate of an individual in a context where the rights of the individual -- rather than the vagaries of international relations -- have heretofore been of paramount importance. I do not believe the State or Justice Departments have shown or can show the Judiciary Committee that the decisionmaking of a neutral and detached federal judge or magistrate is inadequate to protect both the rights of the accused and the needs of the government. I therefore urge rejection of §3194(a) as presently proposed, and appropriate modifications of §3192(2), §3192(d)(1), §3193, and §3195 as set forth above.

Thank you very much for the opportunity to submit these comments. I would be happy to discuss them with members of the Committee and Committee counsel at any time.

Respectfully submitted,

William M. Goodman

WMG:jc

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AREA CODE 312
263-0345

October 15, 1981

OCT 20 1981

Senator Strom Thurmond
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Re: Proposed Extradition Act of 1981

Dear Senator Thurmond:

Thank you for providing me with the opportunity to comment on the proposed Extradition Act of 1981. As you may know, I participated in an extradition hearing as an Assistant United States Attorney in Chicago with the then United States Attorney, Thomas Sullivan. The hearing involved the extradition of an alleged terrorist who had planted a bomb in Tiberias, Israel. When the bomb exploded, two boys were killed and thirty-six others were very seriously injured. The hearing lasted for two weeks. The principal issue which was litigated at the hearing was whether or not the conduct involved fell within the "political offense exception" contained in the United States-Israeli extradition treaty. Thus, much of the hearing consisted of testimony relating to the political situation which not only exists in Israel and the Middle East today, but also going back as far as 1917.

As a result of my experience in that extradition proceeding, I came to the conclusion that three principal changes should be made in the present extradition statute. Firstly, it became painfully apparent to me that the application of the so-called "political offense exception" that is written into most extradition treaties should not be litigated in the courts. Rather, this issue should be decided by the Department of State if and when the extradition request is referred to State for final action. I simply do not believe that the courts are the proper place to litigate the existent political situation in a foreign country with all the foreign policy ramifications involved in that issue.

Secondly, all of us who participated in the extradition hearing on behalf of the Government were somewhat amazed to learn that if the magistrate had ruled against us, the Government could not appeal the magistrate's ruling. The only thing that the Government could do would be to file another extradition complaint and hope that it would be assigned to a different magistrate. This is obviously a very poor method of handling the situation.

Thirdly, it was and is my opinion that the appellate process available to an individual who is ordered extradited is much too slow. As you know, under the present law, a person ordered extradited has no right to a direct appeal to the court of appeals. Instead, he must file a petition for a writ of habeas corpus in the district court and if that is denied, then he has a right to an appeal to the court of appeals. This review procedure, even when operating at top speed, is very slow. The case that I was involved in is an excellent case of point. The defendant in that case, Ziad Abu Eain, was arrested in August of 1979. The extradition hearing took place at the end of September and the first part of October of 1979. The review process then began. At this point in time, Abu Eain is still in custody in Chicago, his cert. petition having just been denied by the Supreme Court within the last few days.

The proposed Extradition Act of 1981 resolves, to a large extent, all three of the problems mentioned above. The act provides that the courts do not have jurisdiction to resolve the application of the political offense exception; the Act provides that either party to the extradition proceedings has a right to appeal from the decision of the magistrate; and, the Act provides for a direct appeal from the magistrate's finding to the court of appeals and greatly limits habeas corpus jurisdiction following any appeal. These are very significant changes in the present extradition law and hopefully they will be enacted into law.

I have one additional comment of substance regarding the proposed act. As I read the draft of the statute, and particularly Section 3198, I see that the proposed act would continue to permit magistrates to conduct extradition proceedings. With all respect to magistrates, it is my feeling that extradition proceedings should be conducted by district judges and not by magistrates. In many cases, extradition proceedings are fraught with sensitive and difficult problems that are not found in any other area that comes before the courts. Because of this, I feel that extradition proceedings should be conducted by a district court judge. In saying this, I recognize that under the proposed act, the court's jurisdiction would be limited to a determination of probable cause, which is a determination that magistrates are used to making in normal criminal proceedings. Even so, I feel that because of the unique nature of these proceedings, the narrow scope of appellate review available to the extraditee, and the impact these cases often have, both inside and outside the United States, the proceedings should be conducted by a district court judge.

In addition to the matters of substance discussed above, I also have a couple of suggestions or thoughts regarding some of the language used in two sections of the proposed act. In Section 3194(a), the second sentence states, "The purpose of the hearing is limited." I suggest that something be added to indicate that the hearing is limited to or confined to determining the issues set out in sub-paragraph (d) of Section 3194 as proposed.

My other comment on form has to do with sub-paragraph (d) of Section 3194. Sub-paragraph (d)(4) provides:

> "the act upon which the request for extradition is based would constitute an offense punishable under the laws of -
>
> (A) the United States;
>
> (B) the State where the fugitive is found; or
>
> (C) a majority of the States."

It is unclear to me whether the "States" referred to in sub-paragraph (C) above are States of the United States or foreign states or both. I think it might be helpful if this were clarified.

Let me conclude by thanking you once again for the opportunity to comment on the proposed legislation. I am hopeful that the legislation will be enacted into law because I feel that it is absolutely essential to the fair and efficient operation of the extradition process.

Very truly yours,

James R. Streicker

James R. Streicker

JRS:11

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THOMAS P. SULLIVAN

OCT 20 1981

October 16, 1981

Hon. Strom Thurmond
United States Senator
209 Russell Senate Office
  Building
Washington, D.C. 20515

Re: S 1639

Dear Senator Thurmond:

Thank you for your letter of September 29, 1981 regarding S 1639, the Extradition Act of 1981. I served as United States Attorney in the Northern District of Illinois from July, 1977 through April, 1981. During that time, I personally handled the trial of the Ziad Abu Eain extradition case which is referred to in footnote 57 of the materials you sent me (Congressional Record, page S9959). As a result of my experiences in that case, I strongly support the enactment of S 1639, particularly insofar as that statute authorizes the government to take a direct appeal from the decision of the trial judge, and prohibits the courts from determining the "political offense" issues which are often raised in extradition cases. The reasons for my support of these provisions are set forth in some length in a letter I wrote to Attorney General Benjamin R. Civiletti on October 16, 1979, but I do not feel free to disclose to you the text of that letter since it was an intra-office communication within the Department of Justice. Perhaps you can obtain a copy of the letter from the Attorney General, or obtain the Attorney General's permission for me to deliver a copy to you.

I do have a suggestion for an amendment to Section 3194(a). I recommend that the following bracketed language be added to the existing language which is not bracketed:

> The court . . . does not have jurisdiction to determine [whether the request for extradition has, in fact, been made with a view to trying

> or punishing the extraditee for an offense of a political character, or] whether the foreign state is seeking the extradition of the person for a political offense or for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions . . .

The reason for the added language is that nearly every extradition treaty currently in effect contains a phrase to the effect that "a person may not be extradited if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him (the extraditee) for an offense of a political character." With the additional phrase which I have suggested, the proposed extradition amendments will clearly establish that the Judiciary has no role whatsoever in determining the applicability of any so-called "political offense exception" found in any existing treaty.

Along these same lines, I recommend that Section 3196(a)(3) be amended to have the following bracketed language added to the existing language which is not bracketed:

> The Secretary of State . . . may decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character or for the purpose of prosecuting or punishing the person for his political opinions [or where the Secretary is persuaded that the person sought has established that the request has, in fact, been made with a view to trying or punishing the extraditee for an offense of a political character].

I am of the firm belief that the passage of S 1639 will greatly improve the procedures which govern extradition cases, and will advance the cause of justice from the viewpoint both of the government and the public as well as the person whose extradition is being sought.

I will be glad to provide any further information which I can.

Yours truly,

Thomas Sullivan

Thomas P. Sullivan

AD HOC COALITION ON EXTRADITION
c/o 110 Maryland Avenue NE, Washington, D.C. 20002
(202) 543-1093, 4

November 14, 1981

Senator Strom Thurmond, Chairman
US Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

We wish to register our concern over the inadequacy of the hearing conducted on the proposed Extradition Act of 1981 (SB1639). Our evaluation of the proposed Act and Professor Cherif Bassiouni's dissenting testimony of October 14 point to critical issues in human and constitutional rights which require a full hearing. At stake is the freedom to express political opposition against foreign governments with whom the United States has or will have extradition treaties.

We would like to request at least one Senate Committee on the Judiciary hearing before a full Committee vote is taken on the proposed Act. The Committee hearing will allow our experts to discuss why the extradition proceedings should include the determination by the court that (a) the complaint filed is proper, and (b) the evidence presented is sufficient to support a finding of probable cause to believe that the person whose extradition is sought may have committed the offense charged under the evidentiary standards of either the federal or state laws of the United States.

The Committee hearing should also allow discussion of the need to define what constitutes a non-extraditable political offense and why the court should use the definition to make the final determination that the person otherwise found extraditable initially should not be extradited because the offense charged is political.

Attached is a list of some of the important issues which should be addressed during the requested hearing. We await your response on the matter.

Respectfully yours,

PARTIAL LIST OF SIGNATORIES

William Wipfler, Director
Human Rights Office, National Council
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Church Coalition for Human Rights in
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Romeo Capulong, Chairman, Human Rights Committee
Philippine-American Lawyers Association of
New York

Attachment

ATTACHMENT

LIST OF SB1639 ISSUES

1. Application of multilateral treaties witn extradition provisions when the requesting and requested parties are signatories
2. Inclusion of an arrest warrant, charging instrument, and/or order or judgment and other evidence pointing to the existence of probable cause among the documents required by a proper complaint
3. Consideration of probable cause before the court can issue a warrant for the provisional arrest of the person sought.
4. Application of the court's judgment of the ability of the person arrested to comply with the extradition order as a requirement for this person's release or detention
5. Inclusion of the duty by the court to inform the person who signifies voluntary consent to his removal of the offense of which his extradition is sought
6. Addition of the determination that (a) the complaint is proper, and (b) there is probable cause to believe that the offense charged has been committed,under the evidentiary standards of United States laws, to the purpose of, and findings from, the extradition hearing
7. Provision to the person sought of the complaint and all documents and evidence submitted against him
8. Admission of other evidence which allows the court to achieve the purpose of the hearing
9. Addition of a general provision that a person will not be extradited if the requirements of the applicable treaty or the proposed Act are found to be lacking
10. Definition of political offense which the court should use to make the final determination that the person otherwise found extraditable initially should not be extradited because the offense is political

November 25, 1981

Mr. Dante C. Simbulan, Executive Director
Ad Hoc Coalition on Extradition
c/o 110 Maryland Avenue, N.E.
Washington, D. C. 20002

Dear Mr. Simbulan:

In following up your discussion with Mr. Summitt on Monday, November 23, 1981, I would urge the Ad Hoc Coalition on Extradition to furnish the Committee its views in writing with respect to S. 1639 within two weeks of the above date. The Committee should be able to consider all viewpoints as this important subject is addressed and I appreciate your express willingness to coordinate this effort.

To assist you in preparing views, I am enclosing most of the statements that have been received by the Committee.

If you have any further questions, please call Paul Summitt (224-8055) at any time.

With kindest regards and best wishes,

Sincerely,

Strom Thurmond
Chairman

NOTE: The Ad Hoc Coalition on Extradition subsequently requested by telephone that its original letter of November 14, 1981, and enclosure thereto be inserted into the hearing record in lieu of a further statement.

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4271922
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December 5, 1981

The Senate Judiciary Committee
United States Senate
Washington D.C. 20510

ATTENTION: Senator Strom Thurmond, Chairman
Mr. Paul Summit, Esq., Special Counsel

RE: S. 1639 (Proposed Amendments to the U. S. Extradition Act)

Gentlemen:

Allow us to express our appreciation for giving us this opportunity to present our comments on Senate Bill 1639, the importance of which transcends national boundaries.

The Human Rights Committee of the Philippine-American Lawyers Association of New York is composed of concerned Filipino lawyers committed to the defense of human rights. It is from this perspective that we sought this opportunity to be heard on this important bill.

There are many provisions of the bill which we believe are objectionable on legal as well as humanitarian grounds. Fortunately, these objectionable features have been extensively discussed by other parties knowledgeable on the subject.

We wish to highlight one section of the bill which we believe will have serious and far-reaching implications to political dissenters in the Philippines and in other third world countries.

We refer particularly to Section 3194 (a) which divests Federal courts of jurisdiction to determine the merits of a defense of "political offense" as an exception and vests the same solely on the Secretary of State.

The reasons given in support of this amendment readily diclose the intent and purpose of its proponents. By positing the idea that the determination of what constitutes a political offense is "inextricably intertwined with the conduct of foreign relations", the section, if approved, will place in jeopardy the lives and liberties of those who are opposed to repressive governments like ours in the Philippines today under Ferdinand Marcos.

We all know that the U.S. government unqualifiedly supports the regime of Ferdinand Marcos. Overriding considerations of U.S. military and economic interests dictate this policy. We underscore the fact, however, that such support is not in the interest of the American people. And, it is certainly incompatible with the traditional democratic values which are enshrined in the American legal system.

Placing the determination of political offense questions in the sole discretion of the Executive Branch of the government will provide it with an additional leverage to lend support to a friendly but oppressive foreign government at the expense of human rights.

Our serious concern and the validity of our objections to this proposed amendment may be easily appreciated when we consider the current situation of Filipino opposition leaders now based in this country. Most of them are facing fabricated charges patently aimed at persecuting and silencing them.

Under current case law, they enjoy the statutory and constitutional safeguards of due process both as to forum and as to procedure. The amendment will abrogate such protection and place their lives and liberties in the diplomatic bargaining table between the U.S. State Department and the Marcos dictatorship. There are thousands of others who are similarly situated from other countries in Asia, Africa and Latin America whose governments are equally repressive and with which the U.S. government maintains friendly relations.

The proposed amendment overlooks the fact that the legal systems of repressive governments in third world countries are basically imcompatible with the American legal system. In the Philippines, for instance, where one-man rule has been in existence for more than nine years now, thousands have already been thrown in jail, many of whom without charges or hearing, for their political activities and opinions. Many have already escaped and fled to this country and many more are expected to do so, if given the chance, to avoid persecution. The situation in the Philippines as we have pointed out is by no means unique. We find similar situations in South Korea, Guatemala, Haiti and in many other countries whose repressive regimes are supported by the U.S. government.

This denial of due process to political dissenters in countries with unjust legal systems will be given tacit approval by the proposed amendment. The absence of adequate safeguards in Section 3194 (a), notably the right to a fair hearing and judicial review, will render the proceedings before the State Department on political offense questions a mere continuation of politically motivated sham proceedings and a mockery of the universally accepted principles of due process and equal protection of law.

Very truly yours,

ROMEO T. CAPULONG
Chairperson

(SGD) FRANCISCO E. RODRIGO JR.
Member

(SGD) ABELARDO SULIT
Member

(SGD) PRIMITIVO DE LEON
Member

(SGD) JOSE ISIDRO JR.
Member

(SGD) BENROME ABAO
Member

note: Signatures of above-named members of the committee were affixed on the final draft during the meeting on Dec 4 6:00 p.m. in the office of Mr. Noni Crajo, 40-63 Main St. Queens. NY.

ACLU

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December 8, 1981

The Hon. Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
2226 Dirksen SOB
Washington, DC 20510

RE: S.1639 "EXTRADITION ACT OF 1981"

Dear Senator Thurmond:

This letter is provided as a follow-up to our correspondence of November 10, 1981 regarding S.1639, the "Extradition Act of 1981," which is scheduled for mark-up within the next several weeks. Although our request for an additional hearing on the bill has been denied, we have been informed by Special Counsel to the Judiciary Committee that these comments will be included in the record of the Committee's proceedings.

In recent years, the ACLU has appeared before the Committee on a number of occasions concerning the revision of the federal criminal law; most recently, we testified on S.1630, the omnibus "Criminal Code Reform Act of 1981."

The ACLU believes that the effort to revise the federal criminal laws is worthwhile only so long as it achieves balance between the complementary public interests in individual rights and crime control. We believe that issues regarding the international extradition of fugitives from other countries is an important element of this process. In that regard, we find S.1639 problematic for several fundamental reasons, and we oppose the bill.

The proposed Extradition Act of 1981 would make major adjustments in current law in a manner substantially at odds with principles of civil liberties and human rights. These changes would result in the elimination of protections which have evolved through over a century of judicial interpretation, executive treaty commitments and Senate ratification. In their place, S.1639 would establish an extradition process undoubtedly subject to political manipulation.

The ACLU opposes the extradition of any person within the United States to a foreign country, without first affording the person a judicial determination in this country of the issues involved in the extradition. In any event, the ACLU opposes any extradition policy which would permit extradition of persons, to any country, who are charged only with conduct that is the exercise of a civil liberty, such as freedom of speech or assembly, or the expression of political opposition to a foreign government. The ACLU also opposes extradition of persons for trials in foreign countries which do not afford rights of due process, sufficient to assure a fundamental fair hearing, or for which the penalty of death may be imposed.

While several elements of S.1639 are troubling, perhaps its most serious flaw can be found in those provisions which would strip the federal courts of jurisdiction to prohibit extradition on the grounds that the offense charged is one of a political character. These provisions are a radical change in current law; they represent an unwarranted shift in government authority to the exclusive control of the executive and, thereby, pose an inherent danger to civil liberties.

The removal of federal court jurisdiction in this area of our criminal law is a direct assault on the constitutional protections of American citizens, as well as those more limited rights afforded foreign nationals. Because the United States is one of a minority of governments that surrender its own citizens to face trial for alleged crimes committed abroad (including the crime of conspiracy), adequate judicial protection of First Amendment rights must be retained. Provisions which purport to transfer such protection into the exclusive jurisdiction of the executive and often volatile political arena of international diplomacy should be opposed.

The ACLU recognizes that the exigencies of diplomatic relations require consideration of many factors unrelated to civil liberties. We assert, however, that in its dealings with foreign governments, the United States should emphasize its commitment to world-wide civil liberties. This commitment, of course, has not always been preeminent in American foreign affairs. However, with regard to extradition, the exigencies of diplomatic relations render the exclusive determination of the political offense exception particularly unsuited to the executive branch; conflicting interests would undoubtedly result in an inconsistent and unfair application of standards. The integrity of such a process would be difficult, if not impossible, to preserve.

We note some of the concerns expressed over the seemingly conflicting nature of the present political crimes exception to extradition. Under current law, the United States may occasionally be impelled to provide asylum to an individual who is repugnant to predominant ethical or political values. However, this factor does not justify the removal of judicial review. It is hoped that reviewing the provisions of S.1639, Congress would seek an approach which may reflect greater precision in the definition of the political crimes exception, but which would not endanger fundamental civil liberties. We note with approval the full recommendations of Professor Christopher H. Pyle* for a more due process oriented approach to extradition determinations.

Under Professor Pyle's approach current judge-made tests of "pure political crimes" and "political motives-during-an-uprising" would be abandoned. The serious crime and double criminality standards of international law would be enacted into federal legislation, and the double criminality test would be supplemented by a supporting test for "doubtful constitutionality." When coupled with a well-defined test for ascertaining the potential for injustice in each case, Prof. Pyle's recommendations provide a solid basis for discussion.

An additional provision in S.1639 warrants note as well. Sec.3192 establishes the procedure to be followed in the initiation of a complaint, the issurance of an arrest warrant, and provide for the detention of the person sought pending the extradition hearing. Under section 3192(c), Arrest or Summons, there is no requirement of a showing of probable cause before an arrest can be made. Hence, an individual, including one persecuted for purely free speech activity, could be provisionally arrested for up to sixty days on the mere recommendation of a foreign government. A standard of probable cause for arrest is vital in the protection of individual rights against Fourth Amendment abuse.

Subsection (d) - Detention or Release of Arrested Person - is essentially a bail provision. While the provision retains the "special circumstances" standard enunciated in Wright v Henkel, 190 U.S. 40 (1903) as a basis for release of the individual on bail, there remains some ambiguity in the application of the standard. Because courts have interpreted the special circumstances standard inconsistently over the years, it may perhaps be appropriate for the legislature to offer clarification of the standard such that it is brought into conformity with accepted tests for release on bail in other criminal cases.

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*Statement of Prof. Christopher H. Pyle before the Subcommittee on Crimes/Committee on the Judiciary - U.S. House of Representatives, Nov. 17, 1981.

It should be noted that under provision of subsection (d), provisional arrest and detention can occur for up to sixty days in the absence of a showing of probable cause or the production of the necessary documents by the requesting state which should be required for the issuance of a valid arrest warrant. The ACLU remains opposed to all forms of preventive detention and the application of all conditions of bail unrelated to assuring the appearance of the defendant at trial. Certainly, with respect to the pre-and post-extradition hearing, there is no reason that the release of persons sought should not be by the Bail Reform Act.

In any case, there should be adequate, documentable probable cause, even for provisional arrest. To lessen the standard as is done under the proposed provision in S.1639 is a potentially broad curtailment of constitutional guarantees.

These are the reasons for our strong opposition to S.1639. We would hope that an additional opportunity to amply air our concerns over this bill might become available. In any event, thank you for this opportunity to present our views.

Sincerely,

Wade J. Henderson

John H.F. Shattuck
Legislative Director

Wade J. Henderson
Legislative Counsel

JHFS/WJH:bt

cc: Members of the Committee on the Judiciary
United States Senate

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December 12, 1981

Senator Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to ask that work on provisions of S. 1639 and the Criminal Code Reform Act relating to extradition be postponed until more hearings can be held and until more serious consideration can be given to this very complex issue.

I would appreciate the opportunity to testify before the Committee on this issue, but if that is not possible, I would be grateful if the enclosed statement could be included in the record.

Thank you for your attention.

Sincerely yours,
Christopher Pyle
Christopher H. Pyle
Associate Professor

EXTRADITION AND POLITICAL CRIMES

STATEMENT OF PROF. CHRISTOPHER H. PYLE FOR THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, DECEMBER 12, 1981

I appreciate this opportunity to comment on proposed revisions of the Federal Criminal Code which would alter the rights of American citizens and foreign nationals to be free from extradition to foreign lands.

I would like to address only one of the proposed revisions: the one which would strip the federal courts of jurisdiction to deny extradition on the grounds that the offense charged is one of a political character.* This provision (Section 3194 (a) of S. 1639) strikes me as extremely unwise and potentially unconstitutional.

Decisions involving foreign demands for the extradition of political activists belong in the courts because they involve human liberty. Central to the American concept of liberty is freedom from political persecution for all persons within the jurisdiction of the United States. This means aliens as well as citizens. The United States government has a constitutional obligation, under the First Amendment and the due process clause of the Fifth Amendment, not to be complicit in the political persecutions of foreign regimes. This is not an obligation of the executive alone, but extends to all three branches of the national government. To strip the courts of jurisdiction to accept a political persecution defense to extradition and to entrust that judgment to our international bargaining agents alone would be to return to the jurisprudence of the Stuart kings.

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*My comments are drawn from research done with Prof. Barbara A. Banoff of the Rutgers Law School at Camden, but the opinions expressed in this statement are my own.

Contrary to what the proponents of this proposal say, it is "a radical departure from present law," because present law was built upon the assumption that the political crimes exception would be included in all extradition treaties, and would be administered by the courts. Until that principle was established in the 1840s, the United States would not join the movement toward international extradition. See Matter of Metzger, 5 How. 176 (1847) and Spear, The Law of Extradition 87-88 (3rd ed. 1885).

Today the United States has extradition treaties with more than 100 nations, including some of the most repressive regimes on earth. In all but a few nations, the criminal justice system is used to punish what we in the United States regard as lawful political opposition or dissent. Given this reality, it makes no sense to take the political crimes defense out of the courts and to turn it over to State Department officials who, fearing economic reprisals against American commerce, may be tempted to please an unjust regime by returning one of its dissidents for what we would regard as a politically corrupted trial.

The United States, like Great Britain, is among a minority of countries that willingly surrender their own nationals to stand trial for alleged crimes committed abroad. The United States is even willing to extradite Americans who are accused of conspiring, while on American soil, to violate the laws of the requesting country. Thus, the proposed legislation would not only strip foreign citizens of judicial protection of their First and Fifth Amendment rights; it would strip American citizens of that protection too.

At a very minimum, then, I urge the Subcommittee to oppose any legislation which might place our precious freedom from foreign political persecution solely in the hands of American diplomats, and to work to revise all recent treaties purporting to do that. See, e.g., Art. 5 (1), Extradition Treaty, United States-Mexico, signed May 4, 1978, ____ U.S.T. ____, T.E.A.S. 9656 (entered into force January 25, 1980).

Beyond that, I would like to encourage the Subcommittee to take this opportunity to revise the political crimes exception to extradition by legislation, both to avoid the anomalies that have given rise to S. 1639, and to put the exception on a firmer moral and constitutional basis.

Defects of the Current Political Crimes Exception

The trouble with the current political crimes exception to extradition is that it sometimes puts the United States in the uncomfortable position of having to give asylum to foreign terrorists who should, by our moral values, stand trial for their crimes. This defect is not inherent in the exception, but in the way the exception has come to be defined by treaty-makers and the courts. Much of the confusion, and many of the anomalies, can be attributed to the failure of legal positivists in the 20th century to remain true to humanitarian ideals of the Founders of the American republic.

Humanitarian Purpose

For the first fifty years of its existence as a nation, the United States refused to enter into extradition agreements. It did so on grounds of common justice and humanity. As Jefferson explained to Citizen Genêt in 1793 when Genêt demanded the return of four fugitives charged with plotting against the new French Republic: "The evil of protecting malefactors of every dye is sensibly felt here as in other nations, but until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplice . . . ." Jefferson, Writings (Ford ed. 1894), VI, 462. This policy was not altered until the political crimes exception was developed to supplement lists of non-extraditable offenses in extradition treaties.

The exception was devised in the 1830s by liberal statesmen in Belgium and France who sought a way to permit the exchange of common criminals without also surrendering revolutionaries like Kossuth, Massini, and Garibaldi to the reactionary regimes of Austria-Hungary and Naples. The inventors of the exception were romantic humanitarians who made the analytical error of assuming that all revolutionaries would be like the fugitives they admired: decent men with high moral values, fighting for liberal democracy against autocratic and repressive regimes, but never acting out of personal greed or lust for power.

Unfortunately, the political crimes exception was not defined by the treaty makers, either in humanitarian terms or in any other way. The task of giving meaning to "offenses of a political character" was left primarily to the courts. British and American courts did not get around to giving meaning to the exception until the late 19th, early 20th century. By the time they did, the politics of revolution and the sympathies of the British and American legal establishments had radically changed.

The shift began with a series of assassinations and bombings directed at high government officials, many of whom were not political reactionaries. Between 1854 and 1911 nineteen heads of state died at the hands of assassins, including Presidents Lincoln, Garfield, and McKinley of the United States, the moderate Csar Alexander II of Russia, the apolitical Empress Elizabeth of Austria, King Humbert of Italy, and President Carnot of France. These murders, the atrocities of the Paris Commune in 1870, and numerous bombings by anarchists, nihilists, and socialists gradually convinced even the most liberal regimes that not all politically motivated criminals were men of honor and sanity, that some were indifferent to the carnage they inflicted on bystanders, that their bombings did not always have immediate, practical objectives, and that some revolutionaries did not intend to confine their attacks to reactionary regimes.

Humanitarian Exceptions

The result was a series of exceptions to the political crimes defense against extradition. The first exception was the so-called *attentat* clause of Belgium and France which denied protection to politically motivated persons charged with attempting to assassinate the head of a foreign government or a member of his family. This clause became standard in American treaties after 1909. The second, never expressly adopted by an American court, denied protection to anarchists. A third, also not adopted by the United States, denied protection to persons charged with war crimes, crimes against humanity, and genocide. Additional exceptions have been developed by treaty to permit the return of persons charged with crimes against diplomats, piracy, hijacking, slavery, and terroristic violence. The United States is a party to some of these.

These exceptions may be rationalized as attempts to limit the inhumane consequences of a well-intended, but overbroad protection. The haphazard way in which the defense and its exceptions have developed, however, has created a number of anomalies. Who gets returned and who does not often turns on when the particular treaty (or judicial interpretation) was made, rather than on any comprehensive policy. Responsibility for not developing such a policy must be shared equally by all three branches of the federal government.

The Effects of Legal Positivism

Part of the problem arises out of the fact that most extradition treaties still express the defense in terms of undefined "offenses of a political character." This vague language has spawned two rather mechanical interpretations. The first denies extradition where the charges against the accused cite "pure" political crimes like treason and sedition. The second, more commonly used, interpretation denies extradition where the criminal acts were politically motivated and took place in the course of a revolution or a political uprising. The purpose of this test was to protect revolutionaries like Mazzini, Kossuth, and Garibaldi, while denying fugitive robbers the defense of claiming that they committed their crimes in order to raise money to finance a revolution sometime in the future.

The "political motives in-an-uprising" test has been adopted by American courts. In re Ezeta, 62 Fed. 972 (N.D. Cal. 1894). In so doing, however, American courts have tended to suspend moral judgments regarding the activities of foreign revolutionaries, and even the activities of foreign government officials against foreign political opponents. Thus, while the Swiss attempted to develop a preponderance test that would permit the extradition of persons whose terroristic means were morally disproportionate to their political ends (e.g. indiscriminate bombing, mass murders, and genocide), American authorities have preferred more mechanical, non-evaluative tests.

The American attraction to the "pure political crimes" plus "political motives in-the-course-of-an-uprising" tests was particularly strong during the early 20th century. It reflected a general decline in popular support for universal rules of right conduct and an increase in ethical relativism. In the 19th century, revolutionaries could be seen as individuals subject to traditional moral judgment and human sympathies. In the 20th century, they became faceless creatures in mass social movements, to be judged moral or immoral, sympathetic or alien, only to the extent that their movement (or their race) could be looked upon with sympathy.

This amorality also reflected a general impoverishment of political thought. In the 19th century, exempting revolutionaries from extradition could be justified on the grounds that despotic rulers had broken their social contract with the people, but by the 20th century even the most despotic governments escaped such judgments by calling themselves "democratic" and by committing their despotism in the name of the people, the state, the nation, the race, or the national tribe. In the 19th century, respect for certain fundamental human rights was regarded by enlightened thinkers as the acid test of governmental legitimacy. In the 20th century, mere control of the instrumentalities of state coercion was sufficient. As nationalist sentiment undermined religious and Enlightenment beliefs in universal values, positivism came to dominate the thinking of many American jurists, and even despotic officials like Croatian war criminals -- the former targets of the political crimes exception -- became under American law its beneficiaries. Karadozole v. Artukovic, 247 F. 2d 198 (9th Cir.

1957), vacated and remanded, 355 U.S. 393 (1958), surrender denied on remand sub nom United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

The Rule of Non-Inquiry

Nothing more clearly reflects this amoral positivism than the rule of non-inquiry into a foreign government's motives for seeking the extradition of a politically active person. As Justice Oliver Wendell Holmes expressed the rule in 1910: "We are bound by the existence of an extradition treaty to assume that the trial will be fair." Gluckman v. Henkel, 221 U.S. 508 (1910).

As a result of this rule, which may now be on the decline,* American courts have risked complicity in foreign abuses of due process for political ends. The courts have done so simply by closing their eyes.

Secretaries of State have not been much better. An American or foreign national who seeks executive exemption from extradition on the grounds that the foreign prosecution of him is infected with partisan political motives or will not meet rudimentary standards of due process and fair punishment is not guaranteed due process at the State Department. The State Department has not developed standards for its administration of the political crimes exception. It does not grant the accused a right to a hearing at the State Department now, and it would not do so under the proposed legislation. As the Senate explanation of S. 1639 candidly admits, the proponents of this bill see the political crimes exception as a political instrument, to be administered politically, because of the international political implications of a denial of extradition. Cong. Rec., Sept. 18, 1981, S. 9956.

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*For example, in Nicosia v. Wall, 442 F. 2d 1005, 1006 (5th Cir. 1971), the court stated: "the United States intends to . . . deny extradition in cases in which it is demonstrated that a fugitive's life or freedom would be threatened on account of his political opinion." In the case of In re Mylonas, 187 F.Supp 716 (N.D. Ala. 1960) extradition for embezzlement was refused because the conviction in abstentia in Greece may have been unjustly influenced by hostile attitudes engendered by the recent civil war.

Proposals for Reform

In my opinion, Congress should take this opportunity to legislate a new definition prescribing which "offenses of a political character" are exempt from extradition. The focus of this definition should be on the potential for injustice lying behind each request. In other words, I am proposing that Congress prescribe a due process approach to extradition and political crimes, rather than the confused approach we have today, or the wholly political approach proposed in S. 1639.

The current judge-made tests of "pure political crimes" and "political motives-during-an-uprising" tests should be abandoned. The serious crime and double criminality standards of international law should be enacted into federal legislation and the double criminality test supplemented by a supporting test for "doubtful constitutionality." The courts should be authorized to make more extensive use of conditional extradition and provision should be made for trying serious offenders against the law of nations in U.S. courts when, for reasons of justice, we cannot extradite them abroad.

The Potential for Injustice Test

In assessing the potential for injustice in each case, American extradition courts should be instructed to examine the totality of the circumstances, including (1) the motives of the foreign law-makers in adopting the criminal law at issue, (2) the ethos and pattern of law enforcement in cases like that of the accused, (3) evidence of partisan hostility on the part of the foreign authorities (or persons or factions behind them) both towards the defendant and others identified with him, (4) evidence that he is, or will be subjected to methods of interrogation, incarceration, prosecution, adjudication, or punishment not normally accorded ordinary criminals in the requesting states, and (5) the fairness of the legal procedures and institutions to which the accused would be consigned.

Great Britain has already enacted legislation of the sort I have in mind. The Extradition Act of 1870 expressly provided that "A fugitive criminal shall not be surrendered if . . . the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character." 33 and 34 Vict. C. 52, §3. Parliament expanded that concept in 1967 when it enacted the Fugitive Offenders Act, one of many reciprocal statutes adopted by members of the British Commonwealth to govern the exchange of criminal suspects among them. The Fugitive Offenders Act provides that no one shall be returned to a member state of the Commonwealth if it appears that he might be "prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." Fugitive Offenders Act, 1967, c. 68, §4 (1).

Of course, it is one thing to prescribe the kind of inquiry the courts should make and another to decide what kind of proof is relevant, and if relevant, sufficient to deny extradition. I suggest, without intending to limit the discretion of the judge, that evidence of the following would indicate the sort of injustice that occurs when considerations of partisan politics corrupt the legal process.

(1) The investigation has been conducted by a different law enforcement branch than that which conducts ordinary criminal investigations;

(2) The decision to prosecute is unusual, in that it involves the resurrection of an unenforced law or a new, apparently strained interpretation of a law;

(3) The decision to request extradition appears to have been made under the pressure of enflamed public passions or under the influence of the accused's political rivals;

(4) The defendant will be tried in a different court than that used for ordinary criminals charged with the same offense;

(5) The requesting state maintains separate penal or interrogation facilities for political prisoners, and the requesting state intends to confine or interrogate the defendant in such facilities;

(6) The defendant, or a group with which he has been associated, is politically controversial or has been the target of systematic discrimination;

(7) The defendant has been the target of political surveillance, covert political harassment, or government-sponsored criticism which would, by American standards, be defamatory;

(8) The defendant has actively opposed the policies or legitimacy of the requesting state's government, either while resident there or elsewhere, in a manner likely to provoke reprisals;

(9) The issues involved in the case are so controversial that it is doubtful whether the accused can receive a fair trial or, if convicted, receive a fair sentence and punishment;

(10) It is doubtful that the requesting state can guarantee the safety of the accused upon his return.

I am not suggesting that American courts should expect the requesting state to adhere to the same procedures and standards that the American constitutions and laws prescribe for achieving due process of law. However, extradition should be denied if it is probable that the foreign system will not adhere to the standards and procedures prescribed by its own constitution and laws or such international standards as the U.N.'s Universal Declaration of Human Rights.

In many instances, the accused will lack the resources to prove systematic injustice within the requesting state's legal system. Nor, for that matter, will the requesting state's presentments always seem credible when, in fact, they ought to be accepted. Thus the courts should be encouraged to invite non-governmental organizations like the International Commission of Jurists and human rights experts from the State Department to appear as "friends of court." And, of course, reference should be made to official and unofficial reports on the status of legal and human rights in the requesting state.

It is not possible to specify with much precision the degree of proof necessary to support a finding of potential injustice in an extradition case. Courts have tried. The British House of Lords has attempted to fix the likelihood of persecution required to deny rendition within the Commonwealth at something less than "more likely than not" and closer to "a reasonable chance." The Law Lords also used the phrases "substantial grounds for thinking" and "a serious possibility." Fernandez v. Government of Singapore, [1971] 1 W.L.R. 987. An Irish Court preferred "substantial reasons." State (Magee) v. O'Rourke, [1971] Ir. R. 205. The comparable American slogan might be "probable cause."

In practice, each of these phrases turns out to be a sliding scale which moves up and down according to a variety of subjective factors, not the least of which is the judge's sense of the consequences of granting or denying extradition. A certain amount of slippage is probably avoidable, and may even be appropriate. However, I think that it would be improper for the standard to slide all the way up to a "clear probability of persecution of the individual petitioner"--the standard now used, at least in the U.S. Second Circuit, for ascertaining the likelihood of persecution necessary to block deportation. Fu v. Immigration and Naturalization Service, 386 F.2d 750 (1970), cert. denied 390 U.S. 1003 (1968).

The Double Criminality--Doubtful Constitutionality Standard

Because the American criminal codes contain relatively few measures specifically enacted to repress political dissent, the doubtful criminality test has the effect of deterring foreign governments from requesting extradition for most transparently politicized crimes that were not expressly labeled "pure political crimes" and listed as not-extraditable by the treaty-makers. The "pure political crimes" test could probably be dropped today with no loss to liberty.

However, American law is not entirely neutral; some essentially political crimes, like group libel laws and seditious conspiracy, linger on, even when their constitutionality is in doubt. Compare Beauharnais v. Illinois, 343 U.S. 250 (1952) to New York Times v. Sullivan, 376 U.S. 254 (1964). See also Brandenburg v. Ohio, 395 U.S. 444 (1969). Moreover, legislatures can always enact new laws which have as their purpose or effect the intimidation or punishment of legitimate political activity. Thus situations could arise in which foreign governments could technically satisfy the double criminality standard and obtain extradition for enforcement of an essentially political crime.

Accordingly I propose that the offense charged be tested not only by the traditional standard of double criminality, but by an additional test of "doubtful constitutionality." Under this supplementary test, extradition would be denied if the foreign statute would, if enacted here, be of doubtful constitutionality under the federal Constitution's guarantees of political freedom, its due process standards of specificity in the drafting of criminal laws, its prohibition against ex post facto laws and bills of attainder, and its rejection of certain state interests, particularly in the realm of morals legislation, as insufficiently compelling to override what under our Constitution would be considered fundamental rights. Criminal laws which appear to have been enacted (or systematically applied) to effectuate a state policy of invidious discrimination as that term has come to be defined under the Fourteenth Amendment's equal protection clause (and the Fifth Amendment's guarantee of liberty) also would constitute "offenses of a political character" under the proposed test of doubtful constitutionality.

In proposing a test of doubtful constitutionality, I do not mean to suggest that the courts should render authoritative decisions on what would be, for our legal system, hypothetical questions of constitutional law. In ruling that a foreign statute would, if enacted here, be of doubtful constitutionality, the court would set no precedent for the interpretation of similar American laws. It simply would find that reasonable judicial minds could differ over the constitutionality of such a law and that to avoid becoming complicit in a potential injustice of a political character, the court should deny extradition.

I recognize that there will be a natural tendency on the part of many judges to assume that if an issue of law has been settled for the moment, it has been settled for all time. The test I propose would resist that tendency. It would recognize that the principle of stare decisis is weakest in the realm of constitutional law and that some constitutional interpretations remain controversial, and hence vulnerable to change, as a consequence of evolving theories of law, changing majorities on the Supreme Court, and new political and economic concerns. I simply proposed that extradition courts be instructed to take notice of that potential for change and acknowledge the doubts which remain.

Conditional Orders of Extradition

Under current law, an extradition court has only two alternatives: to grant or deny the request. Accordingly, it is not difficult to imagine a judge who might risk complicity in a foreign government's vendetta rather than face the moral (or political) burden of allowing an apparently dangerous person to go free within the United States. Moreover, if the only alternative to extradition is to let a dangerous person go free, then the judge is more likely to set a high burden of persuasion which, by having a precedential effect, can increase the burden faced by other persons subsequently invoking my persecution version of the political crime exception. Less drastic alternatives should be more readily available.

One alternative is to make more use of conditional orders of extradition. For example, in a case where the issues are controversial but the government does not appear to be actively enflaming public sentiment, the appropriate response might be to delay extradition until the passions have subsided. If the risk of political persecution is credible, but susceptible to correction, the court might agree to extradite the accused provided that the requesting state make certain assurances, or even accepts a mutually-agreed-upon observer to attend the trial and pass judgment on the fairness of the proceedings, sentence, and attendant investigations. If the observer finds that the foreign proceedings were infected with partisanship or were otherwise unjust (either by the standards of that legal system or by international standards of human rights) then the foreign government could be held to its promise to return the defendant to the United States.

There are other circumstances in which conditional extradition also might be appropriate. If the defendant has shown that he may be tried by a special court, subjected to methods of interrogation that would not pass constitutional muster in the United States, or confined under cruel or unusual conditions, then extradition could be appropriately conditioned. In cases where the investigation, detention, and trial may be just but the subsequent punishments excessive, a maximum could be set by the extraditing court. Or, if the prison to which the defendant would be sent unreasonably threatens his well-being, the extraditing court could specify that his sentence be served in the United States or in some other prison system acceptable to all concerned.

Extradite or Punish

Finally, there may be circumstances in which there is good cause to believe that the accused is guilty of an extraditable crime which, because of its special heinousness, ought not to go unpunished, but where the requesting state cannot be trusted to deal with him justly. The case of the alleged Croatian war criminal may have been one of these. Others come easily to mind. They include war crimes, genocide, "odious barbarism or vandalism" prohibited by the laws of war, "cruel and immoral acts which clearly shock the conscience of civilized people," the assassination of heads of state or their families, crimes against diplomats, piracy, hijacking, slavery, crimes against humanity, and terroristic violence. Rather than send persons accused of these crimes back to face injustice or to let them loose within the United States, it would seem preferable to try them here, or to arrange for their trial before international tribunals.

The Politics of Extradition

The two most obvious arguments against my proposals are to be found in the "Memorandum on Extradition Legislation" which accompanies S. 1639. It asserts that the political crimes exception "is not the kind of issue which lends itself to resolution through the judicial process," and that "a decision on the political offense exception can have a devastating impact on United States relations with the requesting country." Cong. Rec., Sept. 18, 1981, S 9956. I find both arguments unpersuasive.

First, there is nothing about the existing tests -- which the courts devised for themselves -- that is alien to the judicial process. The "pure political crimes" test requires the same sort of skills that led the Supreme Court to refuse to enforce a state sedition law in Brandenburg v. Ohio, 395 U.S. 444 (1969). The "political motives in-an-uprising" test requires no different skills than any other examination of motives. The proponents of this bill would appear to believe that the politicians and staff attorneys of the State Department can do a better job administering these legal tests anonymously, without hearings or standards, than federal judges can publicly, with hearings and a growing body of legal precedent.

Second, the political crimes defense is not "inescapably political in nature, and inextricably entwined with the conduct of foreign relations." It was that way under the Tudor and Stuart kings, before the Habeas Corpus Act of 1679 forbade British monarchs to ship persons out of the Realm for mere *raisons d'etat*. 31 Car. II, c.2, Sec. XI. But it has not been that way in the United States since we began signing extradition treaties containing the political crimes defense during the 1840s.

Third, I think that it is a gross exaggeration to assert, as the proponents of this bill have, that a decision not to extradite a person can have a "crippling effect" on foreign relations. *Cong. Rec.*, Sept. 18, 1981, S9956. I believe that it would be difficult to find one decision not to extradite in our entire history which had such an extraordinary effect. The only instance I can think of was the refusal not to surrender the former Shah of Iran to his successors and that was not a decision at all, because the lack of an extradition treaty with Iran meant that no one in the United States had the authority to surrender him.

Suppose, however, that such a treaty had existed. Which would have been the politically more shrewd method of denying the Shah's extradition: a judicial decision based on probable cause to believe that justice would not be done, or an executive decision based on loyalty to a client dictator? Had the demand for the return of the Shah gone into federal court, the Iranian revolutionaries would have obtained their mini-public hearing on their former ruler's iniquities, the Carter Administration could have continued to feign neutrality, and the return of the Shah would have been denied, not out of respect for him, but out of recognition of the systemic injustice being done daily in Iran's new revolutionary courts.

Fourth, there is a serious flaw in the logic of the "crippling effect" argument for, if we are to make harmony in foreign affairs our highest moral value, we should transfer all extradition decisions to the executive branch, and not just those involving the political crimes defense.

But I do not rest my argument on mere logic or expediency. Principles are involved here: principles of constitutional liberty, due process of law, and international human rights. Extradition in the United States is now, and ought to remain, a matter of law, not foreign policy. The values at stake are too fundamental to be left to partisan politicians and anonymous administrators more concerned with the current state of international negotiations than with the rights and fate of individuals. The proper standard around which to organize the rules governing extradition is due process of law, not the common practice of authoritarian regimes. That was the original understanding of the Founders, and that is how it should remain.

Ziyad Abu EAIN, Petitioner-Appellant,

v.

Peter WILKES, United States Marshal for the Northern District of Illinois, Respondent-Appellee.

No. 80–1487.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 26, 1980.

Decided Feb. 20, 1981.

Rehearing and Rehearing En Banc
Denied April 13, 1981.

Petitioner sought a writ of habeas corpus to prevent the Secretary of State from

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1272, 1275, 1277 (7th Cir. 1980) (*per curiam*). Here there was no substantial evidence to support a finding of a bad motive.

extraditing him in accordance with the determination of a magistrate. The United States District Court for the Northern District of Illinois, Eastern Division, Frank J. McGarr, J., denied the writ. On appeal by the petitioner, the Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) evidence was sufficient to sustain the magistrate's finding of probable cause; (2) it is within Secretary of State's sole discretion to determine whether or not country's requisition for extradition is made with view to try or punish fugitive for political crime, i. e., whether request is subterfuge, but judicial branch has consistently determined whether "political offense" provision of extradition treaties applies to crime charged; and (3) petitioner at extradition hearing failed to shoulder burden of satisfying magistrate of direct tie between Palestine Liberation Organization and specific violence alleged, and failed to show that bombing was incidental to conflict in Israel so as to be act covered within political offense exception to extradition provision of treaty.

Affirmed.

1. Extradition and Detainers ⇨14(2)

Accomplice testimony is competent to support finding of probable cause, and may be of particular importance in extradition cases where all alleged criminal activity occurred in distant country. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

2. Extradition and Detainers ⇨14(2)

Where statements of accomplice were admissions against his own penal interest, they were deemed reliable, in extradition proceeding, the prejudice to accomplice in making the statement having the effect of strengthening its supportive character. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr. Proc. Rule 54(b)(5), 18 U.S.C.A.

3. Extradition and Detainer ⇨14(2)

Where testimony of accomplice is corroborated by further facts there is sufficient evidence to show probable cause, for purposes of extradition. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

4. Criminal Law ⇨211(3)

Issue of corroboration generally arises in context of search warrants, but same standards are applicable to issuance of arrest warrant.

5. Extradition and Detainers ⇨14(2)

Statements of accomplice, corroborated by statements of investigating police officer and of cousin of accomplice and by inferences that might be drawn from petitioner's own conduct of concealment and flight were sufficient to support magistrate's finding of probable cause for arrest for extradition. 18 U.S.C.A. §§ 3181–3195; Fed.Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

6. Extradition and Detainers ⇨14(1, 2)

Accused in extradition hearing has no right to contradict demanding country's proof or to pose questions of credibility as in ordinary trial, but only to offer evidence which explains or clarifies that proof, and magistrate did not err in refusing to admit statements in which accomplice and cousin of accomplice allegedly recanted the earlier statements regarding petitioner's role in bombing. 18 U.S.C.A. §§ 3181–3195; Fed. Rules Evid. Rule 1101(d)(3), 28 U.S.C.A.; Fed.Rules Cr.Proc. Rule 54(b)(5), 18 U.S.C.A.

7. Criminal Law ⇨304(1)

Court of Appeals could not take judicial notice that Israel routinely tortures prisoners; judicial notice can be taken only of matter not reasonably subject to dispute and which is generally known to court or otherwise is capable of accurate and ready determination by sources that cannot reasonably be questioned. Fed.Rules Evid. Rule 201, 28 U.S.C.A.

8. Extradition and Detainer ⇨9

It is within Secretary of State's sole discretion to determine whether or not country's requisition for extradition is made with view to try or punish fugitive for political crime, i. e., whether request is subterfuge, but judicial branch has consistently determined whether "political offense" provision of extradition treaties applies to crime charged. 18 U.S.C.A. § 3184.

9. Constitutional Law ⇨72

Construing application of treaty's political offense exception clause in extradition provision does not require initial policy determination of kind clearly for nonjudicial discretion. 18 U.S.C.A. § 3184.

10. Extradition and Detainers ⇨14(1)

Court does not leave to executive branch sole determination as to whether offense for which extradition is sought by foreign country is "political offense" but views of executive branch are entitled to great weight in extradition matters. 18 U.S.C.A. § 3184.

11. Extradition and Detainers ⇨5

Before act may be found to constitute political offense, for purposes of determining applicability of extradition treaty, magistrate must make two basic determinations, i. e., whether there was violent political disturbance in requesting country at time of alleged acts and whether acts charged were recognizably incidental to the disturbance, and magistrate's legal determination that person that is extraditable does not bind or control later political conclusion of Secretary of State, but if magistrate concludes that individual is not extraditable, it is up to Secretary to decide whether or not to pursue issue before another magistrate. 18 U.S.C.A. § 3184.

12. Extradition and Detainers ⇨5

Though treaty between United States and state of Israel provided that extradition was not to be granted when offense was regarded "by the requested Party" as one of political character, treaty did not by its own terms leave to sole discretion of executive branch determination whether alleged act for which extradition was sought was of political nature. 18 U.S.C.A. § 3184.

13. Extradition and Detainers ⇨14(1)
Constitutional Law ⇨72

Court had no jurisdiction to determine requesting country's motives under extradition treaty between the United States and Israel, and determination whether request for extradition on common crimes amounted to subterfuge by Israel to punish petitioner for political offense was decision within sole province of Secretary of State. 18 U.S.C.A. §§ 3184, 3188.

14. Extradition and Detainers ⇨5

Operative definition of "political offenses" under extradition treaties as construed by United States limits such offenses to acts committed in course of and incidental to violent political disturbance such as war, revolution or rebellion. 18 U.S.C.A. § 3184.

See publication Words and Phrases for other judicial constructions and definitions.

15. Extradition and Detainers ⇨14(2)

Petitioner at extradition hearing failed to shoulder burden of satisfying magistrate of direct tie between Palestine Liberation Organization and specific violence alleged, and failed to show that bombing was incidental to conflict in Israel so as to be act covered within political offense exception to extradition provision of treaty. 18 U.S.C.A. § 3184.

16. Extradition and Detainers ⇨5

Motivation is not alone determinative of political character of any given act for which extradition is sought, as bearing upon applicability of "political offense" exception to treaty provisions for extradition. 18 U.S.C.A. § 3184.

17. Extradition and Detainers ⇨5

For purposes of extradition, indiscriminate bombing of civilian populus is not recognized as protected political act even when a larger "political objective" of person who sets off bomb may be to eliminate civilian population of country. 18 U.S.C.A. § 3184.

18. Extradition and Detainers 🔑5

Offense having its impact upon citizenry but not directly upon government does not fall within political offense exception to extradition provisions of treaty. 18 U.S.C.A. § 3184.

Ramsey Clark, New York City, for petitioner-appellant.

Thomas P. Sullivan, U. S. Atty., Chicago, Ill., for respondent-appellee.

Before PELL, Circuit Judge, SKELTON, Senior Judge,* and WOOD, Circuit Judge.

HARLINGTON WOOD, Jr., Circuit Judge.

Petitioner Abu Eain is accused by the State of Israel of setting a bomb on May 14, 1979, that exploded during the afternoon in the teeming market area of the Israeli city of Tiberias,[1] killing two young boys[2] and maiming or otherwise injuring more than thirty other people. Israel seeks the extradition of petitioner from the United States. Petitioner, a resident of the West Bank area of the Jordan River, traveled to Chicago, Illinois via Jordan shortly after the Tiberias bombing incident. Pursuant to an extradition treaty between the United States and Israel, and in accordance with the federal statute governing American extradition procedure, 18 U.S.C. § 3184, a magistrate in the Northern District of Illinois after a hearing determined that defendant should be extradited to Israel to stand trial for murder, attempted murder and causing bodily harm with aggravating intent. Petitioner then sought a writ of habeas corpus from the district court (there being no provision for direct appeal) to prevent the Secretary of State from extraditing him in accordance with the magistrate's determination. The district court denied the writ. We affirm.

Petitioner contends that the evidence fails to establish probable cause to believe that he committed the crimes charged.[3] Alternatively, petitioner argues that if the evidence is sufficient to show probable cause, then the crimes of which he is accused do not fall within the terms of the treaty providing for extradition. Petitioner claims that it is apparent that the bombing was politically motivated and that political offenses of that kind are excepted from the extradition treaty. Petitioner further contends that if the bombing was not within the political offense exception, then Israel's "indictment" of him for the alleged crimes amounts only to a subterfuge in order to have him returned for trial, not for the alleged offenses, but instead for the political offense of membership in the Al Fatah branch of the Palestine Liberation Organization (PLO).[4]

I. The Process of Extradition

The Extradition Treaty between the United States and Israel became effective in 1963. 14 U.S.T. 1707. Article II of that Treaty provides, *inter alia*, for extradition of persons accused of murder and infliction of grievous bodily harm, as well as attempts to commit those crimes. Article V of the Treaty provides that a person may be extradited only if the evidence is "found sufficient, according to the laws of the place where the person sought shall be found . . . to justify his committal for trial if the offense of which he is accused had been committed in that place. . . ." This form of treaty provision has been held to require a finding of probable cause under federal law. *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973).

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* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

[1] Tiberias is a popular resort town on the west coast of the Sea of Galilee.

[2] At the time Tiberias was unusually crowded with young people gathering for a youth rally.

[3] Originally petitioner contended that he was not the person charged in Israel. The government presented fingerprint and photographic evidence identifying petitioner as being the person both charged and sought to be extradited. The identity issue has not been raised on appeal by petitioner.

[4] For purposes of this opinion, we will refer to both the Palestine Liberation Organization and Al Fatah by the initials "PLO."

As an exception to the foregoing Treaty provisions, Article VI, paragraph 4 of the Treaty states that extradition shall not be granted "[w]hen the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character."

Since the technical aspects of extradition procedure are not explicitly stated in the Treaty, this country's laws guide the manner in which a decision is made whether or not an individual may be extradited from this country to Israel. We briefly discuss the provisions of the laws of the United States concerning extradition since the arguments of both petitioner and the government on the facts of this case and their contentions on what the law requires can best be understood in the context of overall extradition procedure which varies from the common interstate process.

The procedure in the United States for extradition is governed by 18 U.S.C. §§ 3181–3195. In brief, the statutes require that a country seeking extradition of an individual submit to our government through proper diplomatic channels a request for extradition. That request must in general be supported by sufficient evidence to show that the individual is the person sought for the crimes charged, that the crimes are among those listed as extraditable offenses in the Treaty and that there is sufficient justification for the individual's arrest had the charged crime been committed in the United States. After evaluation and approval by the Department of State, the necessary papers may be forwarded to the United States Attorney in the district where the person sought to be extradited may be found. The United States Attorney may then file a complaint and seek an arrest warrant from a magistrate. If a warrant issues the magistrate then conducts a hearing under 18 U.S.C. § 3184 to determine "[i]f, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention. . . ." The Federal Rules of Evidence and Criminal Procedure do not apply in such a hearing. Fed.R.Evid. 1101(d)(3); Fed.R.Crim.Proc. 54(b)(5). It is fundamental that the person whose extradition is sought is not entitled to a full trial at the magistrate's probable cause hearing. The person charged is not to be tried in this country for crimes he is alleged to have committed in the requesting country. That is the task of the civil courts of the other country.

Under § 3184, should the magistrate either determine that the offense charged is not within a treaty's terms or find an absence of probable cause, the magistrate cannot certify the matter to the Secretary of State for extradition. If the case *is* certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender. *See* 4 G. Hackworth, Digest of International Law, § 316, pp. 49–50 (1942); Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962).

The government cannot take a direct appeal from the magistrate's decision *not* to certify the case. There also is no statutory provision for direct appeal of an adverse ruling by a person whose extradition is sought. Instead, that person must seek a writ of habeas corpus. *Collins v. Miller*, 252 U.S. 364 (1920); *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976). The scope of habeas corpus review in extradition cases is a limited one, according due deference to the magistrate's initial determination. *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925). *See In the Matter of Assarsson*, 635 F.2d 1237 (7th Cir. Oct. 31, 1980); *Laubenheimer v. Factor*, 61 F.2d 626 (7th Cir. 1932); *Ornelas v. Ruiz*, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787 (1896). The district judge is not to retry the magistrate's case.

"[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there is *any evidence* warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. at 312, 45 S.Ct. at 542 (per Holmes, J.) (emphasis supplied). The magistrate is obliged to determine whether there is probable cause to believe that an offense was committed and that the defendant committed it. 18 U.S.C. § 3184; *Benson v. McMahon*, 127 U.S. 457, 462–63, 8 S.Ct. 1240, 1243, 32 L.Ed. 234 (1888); M. C. Bassiouni, International Extradition and World Public Order 516–18 (1974) (hereinafter cited as "Bassiouni"). The extradition process has not been challenged in this case by petitioner, but the government has raised a question about the scope of the magistrate's authority.

II. Probable Cause

Petitioner first challenges the sufficiency of the evidence to sustain the magistrate's finding of probable cause. Our scope of review on this issue is limited to determining whether there is "any evidence" to support the magistrate's finding of probable cause. We conclude that the magistrate's determination was supported by sufficient evidence.

Petitioner's hearing before the magistrate lasted seven days. During the hearing sworn statements of Jamil Yasin, Mufida Jaber and Israeli Police Captain Peretz were introduced as evidence. The admissibility of those exhibits was not challenged by petitioner.

According to Yasin's statement, Yasin and petitioner traveled to Tiberias on May 11, 1979 for "reconnaissance" purposes in connection with their membership in the PLO. The two men were scouting for a location in which to place a bomb. On May 14, the celebration day of Israel's Independence, Yasin prepared an explosive charge which he gave to petitioner with an explanation as to its operation. Petitioner left Yasin's home for Tiberias at 9:00 a. m. on May 14 with the charge, and returned about 4:30 p. m. Petitioner went alone to Tiberias because he was concerned that Yasin might be recognized since "there were many people who knew [him]." Government Exhibit 1, "Statement by Yasin." Yasin gave petitioner instructions to place the bomb in a public area, and cautioned him to avoid military vehicles. On his return from Tiberias, petitioner told Yasin that he put the charge in a refuse bin in the center of town. The next day, May 15, Yasin met with petitioner and told him of news reports of the bomb's explosion in Tiberias, stating "the operation had succeeded." The substance of those events was also supported by the statement of Captain Peretz, the head of a special Israeli police team investigating the bombing. On May 17, 1979 Yasin, according to his statement, sent a letter to petitioner which was delivered by Yasin's cousin, Mufida Jaber. Yasin sent the letter after hearing that a person named "Ataf" had been arrested. In her sworn statement Mufida Jaber describes the contents of the note as: "To Ziyad, Talila, Jan and Umm Ammar, has been caught. Be careful." (Petitioner is known by the names Ziyad and Talila.) After reading the message, petitioner told Jaber that he wanted to go to America through Amman, Jordan. On May 20, 1979 petitioner obtained a visa to the United States, and on June 5 he crossed into Jordan with an Israeli transit permit, arriving in Chicago, Illinois, on June 14, 1979. In Chicago, petitioner took up residence with his sister and her husband, Ahmad Yusuf.

On August 17, 1979 agents of the Federal Bureau of Investigation (FBI) went to Yusuf's residence with a warrant for the arrest of petitioner. The agents advised those present of the warrant, mistakenly stating that the request for petitioner's arrest came from Jordan, not Israel. Petitioner was present but lied to the agents about his true identity, giving the name of Kamal Yusuf. At the agents' request, petitioner and another man who was also present accompanied the agents to the FBI field office, where both were fingerprinted and photographed before being taken back to Yusuf's. The FBI subsequently received fingerprints from Israel which matched those taken from "Kamal Yusuf," who was in fact the petitioner. The agents returned to the Yusuf residence on August 22, 1979 to arrest petitioner, but he was no longer there. When informed of the legal consequences of harboring a fugitive, Ahmad Yusuf, petitioner's brother-in-law, who first claimed he did not know where petitioner was, made telephone calls, one in Arabic and one in English, in the second of which he was heard to say he wanted petitioner to come to his apartment to talk with Yusuf's attorney. A short time later petitioner arrived and was placed under arrest. In transit to the FBI office, petitioner said to one of the agents, "It's the Israeli's, not the Jordanians that want me." Up to that point the FBI agents had not informed petitioner of their earlier mistake regarding the country requesting the warrant, but then confirmed that the petitioner was correct about which country sought his extradition.

As noted earlier, Article V of the extradition Treaty provides that "Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, ... to justify his committal for trial...." The first crucial question here, then, is whether evidence introduced at the hearing is sufficient to support the magistrate's finding of probable cause.

[1] In this case we have the statement of Yasin, an accomplice, that petitioner planted the bomb in Tiberias. Although in this circuit we advise a jury to give accomplice testimony such weight as is felt it deserves and to consider it with caution and great care, accomplice testimony is nevertheless competent to support a finding of probable cause. Federal Criminal Jury Instructions, Seventh Circuit 1980, 3.22 Accomplice Testimony. Such evidence may be of particular importance in extradition cases where all the alleged criminal activity occurred in a distant country. In *Curreri v. Vice*, 77 F.2d 130, 132 (9th Cir. 1935), the court, in the context of an extradition proceeding, stated that "the testimony of an accomplice is, next to the confession of the defendant, the most satisfactory kind of evidence that can be produced as to the guilt of the defendant." An accomplice's accusations are not automatically incompetent to support a determination of probable cause, as petitioner would have it.[5]

[2] Yasin's statements inculpated both himself and petitioner in the commission of the bombing. Yasin's statements were admissions against his own penal interest and are deemed reliable. *United States v. Harris*, 403 U.S. 573, 583–84, 91 S.Ct. 2075, 2081, 29 L.Ed.2d 723 (1971); *United States v. Boyce*, 594 F.2d 1246, 1249 (9th Cir. 1979). The prejudice to Yasin in making the statement strengthens its supportive character.

[3, 4] Quite apart from the prejudice to Yasin and his knowledge of the events of the bombing and petitioner's departure, there are additional reasons for crediting the accomplice's statements. The statement of Captain Peretz corroborates Yasin's statements as to the cause, timing, place and occurrence of the explosion in Tiberias. Mufida Jaber's statement corroborates Yasin as to Yasin's communication to petitioner that they were in danger, and petitioner's subsequent departure to the United States. Where an accomplice's testimony is corroborated by further facts there is sufficient evidence to find probable cause. *United States v. Harris, supra; United States v. Boyce, supra.*[6]

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[5] The uncorroborated testimony of an accomplice has been held sufficient to support even the higher reasonable doubt standard necessary for a criminal conviction. *Suhl v. United States*, 390 F.2d 547 (9th Cir. 1968) (testimony of accomplice sufficient even though inconsistent with only evidence connecting defendant with offense). *See United States v. Lee*, 506 F.2d 111 (D.C.Cir.1974) (conviction may rest solely on uncorroborated testimony of an accomplice); *United States v. Green*, 446 F.2d 1169 (5th Cir. 1971) (no absolute rule of law preventing convictions on the testimony of an accomplice).

[6] The issue of corroboration generally arises in the context of search warrants; however, the same standards are applicable to the issuance of an arrest warrant. *See Giordenello v. Unit-*

[5] Furthermore, Yasin's statements are corroborated by the acts of petitioner himself. When first asked his identity by FBI agents, petitioner gave a false name, thereby concealing his identity and, at least temporarily, evading arrest. When subsequently apprehended, petitioner, unprompted, advised FBI agents that it was the Israelis rather than the Jordanians that issued the warrant for him. That petitioner concealed his identity and moved to a different address in Chicago permits an inference of his guilt. Flight also is a legitimate ground from which to infer guilt and here, at the least, lends itself to use as corroboration of Yasin's statement in the consideration of probable cause. *See Rowan v. United States*, 277 F. 777 (7th Cir. 1921) (evidence of flight admissible since its probative value is to indicate a consciousness of guilt); *Kanner v. United States*, 34 F.2d 863, 866 (7th Cir. 1929) (evidence of flight and assumption of false name admissible); *United States v. Dalhover*, 96 F.2d 355, 359 (7th Cir. 1938); *Currie v. Vice*, 77 F.2d 130, 133 (9th Cir. 1935); *United States v. Heitner*, 149 F.2d 105, 107 (2d Cir. 1945); *Green v. United States*, 259 F.2d 180, 182 (D.C.Cir. 1958). That petitioner likewise knew it was the Israelis who sought him also tends to support some inference of guilt. On these facts, the statements of Yasin, an accomplice, corroborated by statements of an investigating police officer and Yasin's cousin, Jaber, and by inferences that may be drawn from petitioner's own conduct of concealment and flight are sufficient to support the magistrate's finding of probable cause.

[6] Appellant contends that the magistrate erred by refusing to admit statements in which Yasin and Jaber allegedly recanted their earlier statements regarding petitioner's role in the bombing. We disagree. An accused in an extradition hearing has no right to contradict the demanding country's proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 F.2d 884 (1973). To do otherwise would convert the extradition into a full-scale trial, which it is not to be. "[T]he extradition proceeding is not a trial of the guilt or innocence [of petitioner] but of the character of a preliminary examination. . . ." *Jimenez v. Aristeguieta*, 311 F.2d 547, 556 (5th Cir. 1962). The inculpatory statements of Yasin and Jaber were made before an Israeli police officer. The statements were transcribed in Hebrew and were subsequently sworn to be true and correct before an Arabic speaking judge of the Magistrate's Court of Jerusalem. The judge conversed with Yasin and Jaber in their native Arabic and determined that the witnesses understood their statements and that the statements were made of their own free will.[7] Petitioner's offer of proof, which was rejected by the magistrate, consists of declarations by Yasin and Jaber in which each recants prior detailed testimony implicating petitioner in the bombing. These declarations were made to private counsel while Yasin and Jaber were being held in prison. Both Yasin and Jaber declared that the inculpatory statements were made under the mistaken belief that petitioner could not be harmed by the statements because he was outside the country. The later statements do not explain the government's evidence, rather they tend to contradict or challenge the credibility of the facts implicating petitioner in the bombing. Therefore, the magistrate properly decided that such a contest should be resolved at trial in Israel.[8] The alleged recantations

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ed States, 357 U.S. 480, 485-86, 78 S.Ct. 1245, 1249, 2 L.Ed.2d 1503 (1958).

[7] We find no merit in petitioner's suggestion that the confessions were inherently suspect by virtue of being transcribed in Hebrew as opposed to the declarants' native Arabic. The magistrate considered this fact along with statements by Judge Shabtay of the Magistrate's Court of Jerusalem that he questioned Yasin and Jaber in Arabic and determined that they understood their statements and made them of their own free will.

[8] Petitioner relies on *Application of D'Amico*, 185 F.Supp. 925 (S.D.N.Y.1960), for a rule that evidence that an accomplice has recanted his testimony is always admissible in an extradition proceeding because the probative value of such testimony is "thin." However, petition-

are matters to be considered at the trial, not the extradition hearing.

[7] Petitioner also challenges the magistrate's rejection of statements claiming that petitioner was in Ramallah on the day of the bombing. This evidence directly contradicts the government's proof that petitioner placed a bomb in a trash bin in Tiberias on the same day. "[E]vidence of alibi or of facts contradicting the demanding country's proof or of a defense such as insanity may properly be excluded from the Magistrate's hearing." *Shapiro v. Ferrandina*, 478 F.2d at 901 (1973). Thus, the magistrate in the case before us correctly refused to admit the evidence.[9] This evidence also is a matter for consideration at the trial, not the extradition hearing.

III. Treaty Construction

Because petitioner's remaining arguments implicate political concerns, it is essential that we explore the significance to extradition of crimes arising in a political context. Most treaties list categories of crimes or specific offenses for which extradition may be requested. There usually are, however, exceptions to the crimes contained in the list. Many treaties include "political crimes" among those exceptions. The traditional extradition treaty language that deals with the political context of crimes excepts from the treaty crimes that are "of a political character." The Treaty involved in this case uses the traditional language, and like most other similar treaties does not further define its terms.

Petitioner notes that courts around the world have recognized analytically separate kinds of political offenses, termed "pure" and "relative." A "pure" political offense is an "act that is directed against the state but which contains none of the elements of ordinary crime," such as sedition, treason and espionage. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Virginia L.Rev. 1226, 1230, 1237 (1962) (hereinafter cited as "Garcia-Mora"). A "relative" political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political." *Id.* at 1230–31. Petitioner argues that he should not be extradited because the crime with which he is charged constitutes a relative political offense, and that the political overtones of the act outweigh the elements of common crime. The government, in addition to disputing petitioner's argument, urges this court to hold that the determination of the political nature of the crime is itself a political question which should be the sole responsibility of the "political branches" (i. e., Congress and the Executive)[10] to decide, not the Judicial branch. The government also contends that the Treaty itself places sole authority to make the determination of a "political offense" in the hands of the Executive. It therefore becomes necessary to interpret the meaning of the "political offense" exception.

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er's characterization of the decision in *D'Amico* is inaccurate. In that case the evidence of recantation already had been admitted by the magistrate. The district court on habeas corpus review had no opportunity to consider whether or not the evidence of recanting was properly on the record, and therefore made no determination on the issue. The district court in *D'Amico* remanded the case to the magistrate because it was unclear whether or not the magistrate had made a specific determination on the issue of probable cause.

[9] Petitioner also urges that reports alleging torture in Israeli prisons should have been admitted to explain the circumstances of Yasin's confession. Petitioner offered no proof that Yasin himself suffered any mistreatment. We are asked to take judicial notice that Israel routinely tortures prisoners, an invitation we decline. Judicial notice could be taken only of a matter not reasonably subject to dispute and which is generally known to the court, or otherwise is capable of accurate and ready determination by sources that cannot reasonably be questioned. *Cf.* Fed.R.Evid. 201 (judicial notice in contexts other than extradition). We note that the reports of various organizations which petitioner brings to our attention were not themselves all unanimous in their findings; some contain both majority and minority conclusions. No aspect of this situation lends itself to judicial notice. *See generally*, W. Hurst, Statutes In Court 89 96 (1970).

[10] *See Chicago & Southern Airlines v. Waterman Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

A. Authority to Determine Extradition Issues as a Matter Within Sole Discretion of Political Branches

[8] The government's argument that the Political Branches should decide the question of whether the crime charged is a "political offense" under the Treaty has no basis in United States case precedent.[11] The government's contention, however, points up an apparent anomaly in the American law of extradition. It is the settled rule that it is within the Secretary of State's sole discretion to determine whether or not a country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i. e., whether the request is a subterfuge. *In re Lincoln*, 228 F. 70 (E.D.N.Y.1915), *aff'd per curiam*, 241 U.S. 651, 36 S.Ct. 721, 60 L.Ed. 1222 (1916); Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962). In contrast, the Judicial branch has consistently determined whether or not the "political offense" provision applies to the crime charged, presumably relying upon the language in 18 U.S.C. § 3184. That section requires a hearing to determine whether there is sufficient evidence "to sustain the charge *under the provisions* of the proper treaty." (Emphasis supplied.)[12] We have not found any case where an American court declined to consider the applicability of the political offense exception when it was squarely presented. If anything, one of the major criticisms leveled at American extradition law is that federal courts have tended to invoke the political acts exception in situations of common crimes mixed with political overtones upon a showing of "any connection, however feeble" to an uprising or rebellion or condition of domestic violence. *See* Garcia-Mora at 1244; I. A. Shearer, Extradition In International Law 171 (1971) (hereinafter referred to as "Shearer").

[9] Congress originally made the determination that it is for the courts to decide how to apply the exception by making it a Judicial determination in the first instance as to whether or not the country requesting extradition had charged an individual with a crime "under the provisions of" a treaty. The Executive branch has, over the years, implicitly endorsed this approach.[13] The present system of American extradition perhaps may have evolved as a way of providing the Executive some flexibility in decision-making by allowing it to defer to the Judiciary's decision, for example, to refuse extradition of an individual who the Secretary of State is reluctant to extradite anyway. This "permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations." Lubet & Czaczkes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J.Crim.L. & Criminology 193, 200 (1980) (hereinafter cited as "Lubet & Czaczkes"). *See* Shearer at 192; Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L. J. 71, 74 (1978). With this background in mind, we consider whether the issues involved in applying the political offense exception are such that only the Executive should make the determination.

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[11] The only case with any similarity which we have found that permits the Executive to make the initial determination in extradition matters that the crime charged was committed and that the person sought to be extradited committed it, *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969), involved a treaty that implicated the "special relationship between the Canal Zone and the Republic of Panama." *Id.* at 686. The court indicated, however, that any Executive determination to extradite still would be subject to review on habeas corpus.

[12] A clause excepting political offenses is a "provision" of the treaty. *See generally* cases cited in Note, 62 Colum.L.Rev. at 1322, nn. 73, 74. *Compare Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925) (habeas corpus available to determine "whether the offense charged is within the treaty").

[13] Prior to the enactment of the original version of 18 U.S.C. § 3184, the Executive exercised complete control over extradition without reference to the courts. Bassiouni at 505. Thus, from 1794 to 1842 the Executive had unfettered discretion in this area: Immediately upon the statute's enactment, the Executive began a policy of deference to the role of the Judiciary as mandated by Congress. *See* 4 Op. Att'y Gen. 201 (1843).

The government does not direct our attention to a specific constitutional provision that could be invoked to guide a resolution of this issue which, the government says, does not lend itself to judicial application. *See* L. Tribe, American Constitutional Law 75 (1978) (hereinafter referred to as "Tribe"). Instead, the government emphasizes the constitutional commitment of foreign policy and international affairs decisions generally to the Executive, and suggests that the political nature of those areas renders them unsuitable for judicial consideration. But, as the Supreme Court has said, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence." *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962). This court must decide whether the present case contains elements of foreign policy that do lie beyond judicial competence, and if so, whether that justifies a rule that precludes judicial consideration of similar treaty provisions in all cases.

We disagree with the government's argument relying on *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710, that construing application of a treaty's political offense exception clause requires "an initial policy determination of a kind clearly for nonjudicial discretion." It is clear that courts have authority to construe treaties. *See* Tribe at 76, n. 35. In the absence of an Executive determination that a treaty has been terminated, a court may consider the issues raised when it is asked to apply the treaty: the Court "can construe [the] treaty and may find it provides the answer." *Baker v. Carr*, 369 U.S. at 212, 82 S.Ct. at 707. *See* J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 104 (1978); L. Henkin, Foreign Affairs And The Constitution 210–16 (1972).

[10] The government stresses the unique resources available to the Executive to aid its determination of the political situation in foreign lands. But the State Department can and has made it a practice to share that information with courts during extradition proceedings. *Cf.* Baldwin, *The Foreign Affairs Advice Privilege*, 1976 Wisconsin L.Rev. 16 (Secretary of State may withhold certain foreign affairs information from Congress). In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil at the site and time of an individual's alleged illegal activities. The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.[14] The resources to make

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[14] This distinguishes the cases cited by the government that confer sole discretion on the Executive to determine when a state of war or belligerency exists in another country. *In re Cooper*, 143 U.S. 472, 12 S.Ct. 453, 36 L.Ed. 232 (1892); *The Three Friends*, 166 U.S. 1, 17 S.Ct. 495, 41 L.Ed. 897 (1897); *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897). In those situations a court would be unable definitively to say that a specific level of hostility had been reached. When considering the political offense exception, a court need consider only whether some incidents of political violence have occurred, and not whether the violence has risen to a particular level.

We note especially the following language from *In re Cooper*:

> We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress *or of a treaty*, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

143 U.S. at 503, 12 S.Ct. at 460 (emphasis supplied). The question, then, is not so settled as the government suggests, since there is no extradition statute specifically authorizing the Executive to make the determination whether the political offense exception applies, nor is there a statute defining the term.

We also note that *The Three Friends* case makes specific mention of the numerous legal consequences of declaring a "state of belligerency," which include impacts on the conduct of commerce and even the war power, 166 U.S. at 63, 17 S.Ct. at 502. We emphasize that there has been no showing that such broad legal consequences would obtain in the case before that initial determination can ordinarily be sufficiently produced for judicial consideration. *In camera* review is available for sensitive evidence. In this case an assistant legal advisor for the State Department's Office of Combating Terrorism, an authorized spokesman for the Department, did appear and testify. Mr. Fields explained that "It is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable in both states." There was additional evidence offered by the Department of State concerning the positions consistently taken by our high government officials in regard to terrorism. The official Executive view was made known to the magistrate. Even though we do not leave sole determination to the Executive branch, we believe its views are entitled to great weight in extradition matters.

The government also expresses concern over the possibility that a court's pronouncements on certain subjects may conflict with the Executive's and embarrass this country's conduct of its foreign policy. In particular, the government points to petitioner's claim that in order to consider the political aspects of his alleged actions a court must "recognize" the PLO as a legitimate political group, a position the United States has not taken. We agree with the government when it says "[t]hat decision should only be made by those directly responsible for overseeing our foreign relations." However, the formulation of the political offense exception does not require any such "recognition." It requires only the recognition that there occurred violent acts and political tensions that resulted in the charged criminal acts. That determination does not give rise to a direct conflict: in most cases there is no real contention about the existence *vel non* of political violence in the requesting country.

The government's concerns seem directed to whether the Judiciary will recognize a given sort of violence as falling within the protection of the political offense exception, thus implicitly conferring on certain actions a status with which the Executive might disagree. We point out that the Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable "political question."[15] To some extent, "all constitutional interpretations have political consequences," R. Jackson, The Supreme Court In The American System 56 (1955), and indeed the same follows from any treaty interpretation. We recognize the need for special sensitivity in areas such as our government's foreign relations conduct, but that sensitivity does not preclude the Judiciary from having a part in the process of determining whether the political offense exception applies. That determination involves an approach to factfinding that is traditional to the courts.

[11] We also disagree with the government's argument that there are no judicially discoverable and manageable standards to guide the court's discretion. For better or worse, the extradition statute requires the magistrate to determine that the crime alleged is listed in the applicable treaty, and that the provision of the treaty relating to political offenses does or does not apply. Before an act may constitute a political offense, there must be two basic determina-

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us upon a finding that political upheaval is occurring in Israel.

[15] We also note that the Judiciary has made numerous decisions that touch our nation's domestic and foreign policy concerns and implicate matters that traditionally are thought of as Executive functions—on occasion to the chagrin of the latter branch. *See New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (permitting publication of Pentagon Papers in face of argument of threat to relations with allies); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (restricting Executive discretion against claim of necessity to further international military policy). *See also Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (appraisal of international tensions and conditions in evaluating constitutionality of statute).

tions made by the magistrate: that there was a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance. The magistrate's *legal* determination that a person is extraditable does not bind or control the Secretary's later *political* conclusion. *In re Ezeta*, 62 F. 9[illegible] (N.D.Cal.1894). On the other hand, if the magistrate concludes that the individual is not extraditable, it is up to the Secretary to decide whether or not to pursue the issue before another magistrate, as in *In re Gonzalez*, 217 F.Supp. 717 (S.D.N.Y.1963). The Secretary, it appears, contrary to general practice, has been permitted to shop for a more receptive magistrate.

In order to assure that there is adequate protection of the rights of an individual whose extradition is requested, "[p]urely as a practical matter it would seem reasonable for the courts of this country to make an initial finding of extraditability of particular offenses." *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973). As Judge Friendly stated in the *Shapiro* case, "we see little reason why a prior judicial determination would be viewed by [the Secretary of State] as an unwarranted intrusion upon executive power." *Ibid. See* Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 584 (1966) (courts are cautious about invoking political question doctrine where important individual rights are at stake). *Cf.* Kutner, *World Habeas Corpus and International Extradition*, 41 U.Toledo L.J. 525, 532 (1964) (Secretary of State's power of ultimate determination not to extradite, despite court certification, shows latitude democracy allows in concern for individual rights).

The government stresses that courts have refused to look at the requesting country's motives to determine if extradition for a common crime is sought merely as a subterfuge for trying an individual for political crimes, *see Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), even in the presence of an express provision of the treaty, such as the one in the Treaty before us. This raises the logical question of why the Executive's authority is "virtually untrammelled" [16] in that area, but is subject to an initial decision by the Judiciary on the applicability of the political offense exception.

The different approaches taken on political offense and "subterfuge" issues are not so anomalous as the government suggests. In considering the presence of a political offense, the court determines whether the crime charged stemmed from political violence. To make that determination, the magistrate need look only to the facts supporting the extradition request for evidence as to whether or not violent political activity was unfolding at the time to which the facts relate, and of the individual's recognizable connection to that violence. Compared to that, evaluations of the motivation behind a request for extradition so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion. The Executive's evaluation would look at the actual operation of a government with which this country has on-going, formal relations evidenced by the extradition treaty and imply that the government may be disingenuous. This obviously would be an embarrassing conflict over assumptions essential to our foreign relations about the integrity of governments with which the United States deals. A judicial decision, however, that establishes an American position on the honesty and integrity of a requesting foreign government is distinguishable from a judicial determination that certain events occurred and that specific acts of an individual were or were not connected to those events. The latter type of decision simply categorizes the facts involved in a given case and then construes the treaty to determine whether or not the facts fall within its ambit. Thus, the Judiciary's deference to the Executive on the "subterfuge" question is appropriate since political questions would permeate any judgment on the motivation of a foreign government.[17]

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[16] Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313, 1323 (1962).

It should be emphasized, however, that the government's argument on this point is not without some merit. If our long established extradition process is thought to need some overhauling, it is for the Congress to consider, not the courts.

B. Treaty Language: Discretion to Determine Political Nature of Offense Within Sole Discretion of Executive Branch

[12] The government argues that the Treaty, by its own terms, leaves to the sole discretion of the Executive branch the determination whether or not an alleged act for which extradition is sought is of a political nature. In support of its argument, the government cites the text of the Treaty: "Extradition shall not be granted ... When the Offense is regarded *by the requested Party* as one of a political character...." Art. VI, par. 4 (emphasis added). The government contends that the words "requested Party" refer only to the Executive branch, citing *Berenguer v. Vance*, 473 F.Supp. 1195 (D.D.C.1979). We conclude that the *Berenguer* case is inapposite and that the government's contention lacks sufficient merit to justify a holding in its favor on this issue.

In *Berenguer*, Italy had obtained Berenguer's extradition from the United States through normal channels for trial on certain defined crimes. Once Berenguer was in Italy, that country asked the State Department to expand the list of charges for which he could be tried. This request was necessary because a principle of international law known as the "doctrine of specialty," which was explicitly incorporated in the treaty, states that the requesting country must seek permission of the "requested Party" before prosecuting or punishing an extradited party for any offense committed prior to extradition, except that for which he was extradited. Berenguer claimed that the State Department could not acquiesce to an extension of the original charges absent a new hearing before an American magistrate. The district court disagreed, noting that once Berenguer was lawfully extradited and had arrived in Italy he was no longer subject to the jurisdiction of United States courts and his American due process rights no longer controlled his case. 473 F.Supp. at 1198. Expansion of the list of crimes for which he could be tried became a matter of state to be decided by the Executive branches of the two nations. That court also noted that the language of the treaty did not specify a procedure to guide the decision on expanding the list of crimes for which Berenguer could be tried. Thus, the district judge held that the decision was left to the State Department. To that limited extent, the government is correct when it argues that the district court in *Berenguer* held that the term "requested Party" refers to the Executive branch, since there was an absence of statutory or treaty language "requiring a second judicial hearing once extradition has been accomplished." *Id.* at 1197. But the court in *Berenguer* explicitly noted that *before* extradition is accomplished, there must be a hearing before a magistrate to determine whether there is probable cause to believe the person committed a crime for which he could be extradited under the terms of the treaty. *Id.* at 1196.[18] The district court's careful distinction in that case between extradition decisions made before and after actual extradition counsels against our expanding the *Berenguer* holding to read the term "requested Party" in extradition treaties as always referring solely to the Executive branch.

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[17] *Compare* the "Act of State" concept, which says that "the courts of one nation will not sit in judgment on the acts of the government of another done within [the latter's] own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed.2d 456 (1897).

[18] *Compare Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir. 1978), where the court says the extradition hearing is limited, *inter alia*, "merely to ascertain whether a treaty applies...." The government cites both the *Sabatier* and *Berenguer* opinions in support of the argument that the courts may only make a determination on the issue of probable cause, which in the government's view excludes judicial application of the political offense exception. As we discuss in an earlier part of this opinion, it has been the law of extradition in this country that the probable cause hearing comprehends a determination that the crime charged is one "under the provisions of" the treaty (*i. e.*, that it is not a political offense). 18 U.S.C. § 3184. While the portion of the *Sabatier* opinion quoted in this footnote, if read alone, may be construed to support the govern-

As the district court stated in *Berenguer*, one constant in American extradition law is that the magistrate is to make the initial determination in the extradition process. We hesitate to hold on so slim a record as is available on the intent of the drafters of the Treaty in this case that the major "procedural safeguards established to protect the defendant's rights" in extradition, *id.* at 1198, have been deliberately written out of the document, although the treaty language lends some support to that interpretation. Our caution is reinforced when we note that the only case we have found that holds the Executive branch entitled to make the initial extradition decision subject only to later habeas corpus review, *Sayne v. Shipley, supra* n.11, did so in the narrow context of an extradition treaty arising from the "special relationship between the Canal Zone and the Republic of Panama." 418 F.2d at 686. No similar "special relationship" exists between the countries who are parties to the Treaty before us.

C. Extradition Request as a Subterfuge

[13] Petitioner claims that Israel seeks his extradition on charges of common crimes in order to try him for his political beliefs. Thus, he says, he should not be extradited, even though all proceedings in Israel concerning this case have been conducted in civil, not military, court.

The determination in this case whether or not the request for extradition on common crimes amounts to a subterfuge by Israel to punish petitioner for a political offense is, as we have clearly noted, a decision within the sole province of the Secretary of State. *Laubenheimer v. Factor*, 61 F.2d 626 (7th Cir. 1932); *In re Lincoln*, 288 F. 70 (E.D.N.Y.1915), *aff'd per curiam*, 241 U.S. 651, 36 S.Ct. 721, 60 L.Ed. 1222 (1916); *Sindona v. Grant*, 461 F.Supp. 199 (S.D.N.Y.1978). As should be clear from our earlier discussion, petitioner's claim is without merit, since this court has no jurisdiction to determine the requesting country's motives under this Treaty.

IV. Political Offense Exception

[14] The operative definition of "political offenses" under extradition treaties as construed by the United States limits such offenses to acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion. Shearer at 178–81; Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 Marquette L.Rev. 777, 795–97 (1977) (hereinafter referred to as "Cantrell"); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir.), *cert. denied*, — U.S. —, 101 S.Ct. 612, 66 L.Ed.2d 497; *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Ramos v. Diaz*, 179 F.Supp. 459 (S.D.Fla.1959); *In re Ezeta*, 62 F. 972 (N.D.Cal.1894). Petitioner argues that it is apparent that the crime with which he is charged is a political offense because there was and is a conflict in Israel that involves violence, and the PLO, to which petitioner allegedly belongs, is a party to that violence.

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ment's view, when read in context of that opinion and of general principles governing extradition, it suggests quite a different view. At the outset of the opinion, 586 F.Supp. at 868, the court quotes the Supreme Court in *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925), for the proposition that the magistrate is to determine "whether the offense charged is within the treaty," language which tracks that of § 3184 both in form and meaning. Since the *Sabatier* court was not presented with an issue implicating an exception to the treaty, it is hardly surprising that later in the opinion the court did not specifically refer to broader duties of the magistrate during the extradition hearing. The same appears to be true in *United States v. Clark*, 470 F.Supp. 976 (D.C.Vt.1979), which cites *Sabatier* for the more narrow definition of "its role in this proceeding." *Id.* at 978. The *Sabatier* and *Clark* opinions merely re-state the statutory framework that leaves to the Judiciary the initial determination whether the political offense exception applies.

Petitioner notes that generally the motivation of the individual in committing the alleged crime is not an issue in the extradition proceeding. Lubet & Czaczkes at 203. "[T]he nature of the offense does not depend on the motives of the actor just as [the] nature of the offense may not confer upon the actor certain motives that were not present at the commission of the violation." Bassiouni at 378. However, petitioner maintains "that American courts will seize upon the slightest connection between the crime and political act or objective in order to find a political offense." Cantrell at 795. Thus, petitioner asserts that he cannot be extradited because Israel's allegation of his membership in the PLO is enough to bring his alleged role in the bombing within the scope of the political offense exception. Petitioner's characterization of the American law of extradition is facially plausible. But, like most generalizations about complex legal areas, there is much detail that petitioner's position fails to take into account.

The United States law of extradition has been severely criticized for not having progressed from its origins in nineteenth century British law. *See, e. g.*, Shearer at 181. In particular, it has been asserted that the "narrow interpretation" of the political offense exception which rejects consideration of the motivations behind an alleged crime "may be characterized as both underinclusive and overinclusive, as it tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising.... [T]he overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder." Lubet & Czaczkes at 203, 204. Such a narrow approach "can result in grave abuse" of treaty exceptions for political offenses. Cantrell at 795. While we keep these concerns in mind, we conclude that existing law is sufficiently flexible to avoid such abuses.

The weakness of the approach attributed to American courts is apparent in the case before us. Petitioner consistently has tried to establish that there exists in Israel a state of conflict in the nature of a war, revolution or rebellion. This, he contends, establishes the propriety of using the political offense exception in this case. The magistrate refused to take judicial notice of the existence of a state of political and military conflict between Israel, its neighboring states and national liberation movements in the Middle East. The magistrate did, however, receive evidence on "the nature of the conflict in the Middle East before, during and after the 1948 proclamation of a State of Israel ... as well as the 1967 occupation by Israel of the West Bank of the country of Jordan...." *In re Abu Eain*, No. 79 M 175 (N.D.Ill. Dec. 18, 1979) (Mem.) at 14. It appears that the magistrate may have assumed that a conflict existed at the time of petitioner's alleged acts since her subsequent discussion on the applicability of the political offense exception went mainly to issues that usually are considered only after a determination of a violent political disturbance has been made.

There remains, however, some question as to whether that finding of a "conflict" is sufficient to establish that there exists in Israel "a violent political disturbance, such as a war, revolution or rebellion." The nature of that conflict is somewhat different than disturbances that have been considered in other cases where resistance to extradition on grounds of a political offense exception has been sustained. Those cases involved on-going, organized battles between contending armies, a situation which, given the dispersed nature of the PLO, may be distinguished. *See, e. g., Ramos v. Diaz*, 179 F.Supp. 459 (S.D.Fla.1959) (members of organized revolutionary army with established chain of command operating within the country); *United States v. Artukovic*, 170 F.Supp. 393 (S.D.Cal.1959) (military government installed by Nazis during World War II; discussed in dictum). Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past. An ongoing, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence. Once the circumstances move away from that context, the judiciary's task of determining what degree or type of violent disturbance permits a successful invocation of the political offense exception becomes more difficult. It also poses a different question of proof than otherwise may be involved. *See generally* Lubet & Czaczkes at 206, 208–10.

For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure as an incident of the expulsion of a certain population from the country,[19] and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.

[15] The magistrate, however, understood that the finding of violent upheaval at the time an allegedly political crime occurred was not the end of the analysis under the political offense exception. She went further and found that petitioner had failed to establish that the bombing was incidental to the PLO's objectives. The magistrate held that simply noting membership in the PLO, but not tying the membership to the specific act alleged was insufficient to satisfy the burden petitioner must shoulder in order to invoke the political offense exception. Absent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which may be reasonably "incidental to" a political disturbance. Because the bombing was not shown to be incidental to the conflict in Israel, the magistrate held that it was therefore not an act covered within the political offense exception. We agree with her conclusion.

[16, 17] The reason that the bombing was not "incidental to" the conflict does not lie in the motivation for the act, since, for purposes of extradition, motivation is not itself determinative of the political character of any given act. Lubet & Czaczkes at 203 n.102. The definition of "political disturbance," with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the

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[19] *See* "Covenant Against Israel," adopted by the Palestinian National Council in 1968 and discussed by one of petitioner's witnesses during the hearing before the magistrate. The document asserts that "Palestine" is the rightful homeland solely for "Palestinians." Article 6 of the Covenant then states that "Jews who were living permanently in Palestine until the beginning of the Zionist invasion will be considered Palestinians." A reading of the testimony of that witness, who was produced as petitioner's expert in this area, indicates that the document would mark the "Zionist invasion" as beginning in 1917 or 1922. Jews who arrived in Israel after those years would be unwelcome in the Palestinian state. Because they comprise the bulk of the present-day Israeli Jewish population, they are the targeted group of the "armed struggle" (Covenant, Article 9) that the PLO wages.

government. The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.

[18] This policy long has been articulated in extradition cases of this and other nations in the context of terrorist activities, particularly those of anarchists. Although distinguishable in some respects, the case of *In re Meunier* [1894] 2 Q.B. 415, provides the earliest illustration of the principle under British law, from which the American law of extradition developed. France had requested the extradition of Meunier from England where he had traveled after allegedly bombing a cafe and army barracks in the cause of anarchy. In granting France's extradition request, the divisional court on habeas corpus discounted Meunier's claim that his activities aimed at terrorizing an entire population in order to subvert a government through social disorder fell within the political offense exception. The court first noted that the anarchist movement did not represent a party, in the usual sense of the term, "seeking to impose the Government of their own choice on the other [party]," 2 Q.B. at 419, a prerequisite for invoking the exception. Rather, the aim of the anarchists was to topple the formal political structure by destroying its supporting social fabric.[20] The anarchist's efforts were not directed at the government, but instead were "directed primarily against the separate body of citizens," *id.*, a form of political expression not protected under the political offense exception. As recent commentators have stated, "an offense having its impact upon the citizenry, but not directly upon the government, does not fall within the political offense exception." Lubet & Czaczkes at 202. *See* Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J.Int'l Law & Econ. 475, 501 (1975) quoting U. N. Secretariat study: "[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent").[21]

Anarchy presents the extreme situation of violent political activity directed at civilians and serves to highlight the considerations appropriate for this country's judiciary in construing the requirements of our extradition laws and treaties. But we emphasize that in this case, even assuming some measure of PLO involvement, we are presented with a situation that solely implicates anarchist-like activity, i. e., the destruction of a political system by undermining the social foundation of the government. The record in this case does not indicate that petitioner's alleged acts were anarchist-inspired. Yet the bombing, standing detached as it is from any substantial tie to political activity (and even if tied, as petitioner insists, to certain aspects of the PLO's strategy to achieve its goals), is so closely analogous to anarchist doctrine considered in cases like *In re Meunier*, as to be almost indistinguishable.

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[20] We acknowledge that it may not be "textbook" political science and sociology to distinguish between disagreement with a government and with the society that establishes it. Nevertheless, as a practical matter it must be recognized that within every society there will be elements who are dissatisfied with their government. At times this dissatisfaction may be expressed, deliberately or by reason of an uncontrollable flare of temper, in violent acts that have an impact on private social interests. We do not have occasion in this case to consider the boundaries within which the political offense exception operates in these situations. We are concerned here only with a violent act focused at the *social* structure.

[21] *Cf.* Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L.J. 71, 82 (1978), discussing the Swiss concepts of "predominance" and "proportionality": "The criminal action must be 'immediately connected with its political object,' and the damage caused must not be out of proportion to the desired result." The parties did not argue the direct application of these concepts to American extradition law. While proportionality and predominance may be unarticulated concepts in the existing Anglo-American framework of extradition, we leave consideration of that question for another time.

We have found no American cases that detract in any way from the applicability of the *Meunier* theory to the case before us. The case that comes closest to challenging *Meunier's* applicability is dictum contained in *United States v. Artukovic*, 170 F.Supp. 383 (S.D.Cal.1959), one of the most roundly criticized cases in the history of American extradition jurisprudence. *See, e. g.*, Lubet & Czaczkes at 206–07; Garcia-Mora at 1246–47; Cantrell at 795–96. In *Artukovic*, the magistrate commented in dictum that he believed murders of civilians were political offenses when carried out pursuant to the orders of a Croatian government official who was serving at the time with the blessing of the Axis powers in World War II. Against the backdrop of confused and rapid shifts of wartime government, the magistrate felt, killings accomplished by various militia protecting each successive government constituted political acts. 170 F.Supp. at 392–93. The magistrate noted that orders for the killings were aimed at specific racial groups denominated "enemies" of the Croatian government, not at the general population. *Id.* at 390.

The reasoning in the *Artukovic* case (which of course is not binding precedent for this court) can be distinguished from the facts before us, since the acts constituting Artukovic's alleged offenses were carried out by a government in power, which was at least nominally seeking to eliminate its political "enemies." In the present case, the bombers could not discriminate between their victims. We note that the *Artukovic* court's dictum could not be challenged by the United States government on appeal, since the initial decision in extradition cases effectively terminates proceedings upon a finding that a person is not extraditable. And the actual holding in the case was that Artukovic could not be extradited since the government failed to show probable cause that he committed the crimes. We also note that the country which sought Artukovic's extradition had obtained a United States Supreme Court order vacating earlier judgments that found the political offense exception applicable to the case. *Karadzole v. Artukovic*, 355 U.S. 393, 78 S.Ct. 381, 2 L.Ed.2d 356 (1958).[22]

Other cases more sharply demonstrate the difference between the usual application of the political offense exception and the situation before us here. For example, the more usual situation occurred in *Ramos v. Diaz*, 179 F.Supp. 459 (S.D.Fla.1959). The district judge conducting the initial extradition hearing pursuant to 18 U.S.C. § 3184 found that the killing of a political prisoner by two members of Castro's revolutionary army in Cuba (who had left that country after the revolution) was a political offense preventing extradition of the alleged killers upon request from Communist Cuba. The district judge noted that the victim was "one of many political prisoners captured in furtherance of the political uprising. The Defendants were under the command of the revolutionary forces engaged in mopping up operations as part of the revolution." 179 F.Supp. at 459. The situation thus was unlike petitioner's alleged actions in the present case, where the killings were done, so far as we can tell from the present record, without regard for political affiliation or governmental or military status of the victims.[23]

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[22] *See* 170 F.Supp. at 383–86 for a full account of the *Artukovic* case's convoluted progress through the judicial system.

[23] As a collateral matter, petitioner claims there is no evidence that those who were killed and injured in the Tiberias bombing were civilians, and thus argues that discussion of their civilian status is inappropriate at all levels of this case. It should be pointed out that our discussion revolves around the population to which the violent act was directed. The fact that the explosive was placed on a busy public street during a public holiday in a resort city

We note that even in the nineteenth century the United States Supreme Court indicated that the civilian status of victims is of significance when courts consider the political offense exception. In *Ornelas v. Ruiz*, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787 (1896), the Court upheld a magistrate's determination that a raid on a Mexican village and its military garrison by more than a hundred men was not incidental to violent political disturbances that were occurring in Mexico at the time, as the raiders had claimed. The Court felt that the magistrate was justified in refusing to apply the political offense exception, "in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed." 161 U.S. at 511, 16 S.Ct. at 693. The applicability of *Ruiz* to the present case is even more compelling when one notes that the raiders were later tried in Mexico for their participation in the revolution they claimed the raid had furthered. 4 G. Hackworth, Digest of International Law, § 316, pp. 50–51 (1942). It is apparent that the Supreme Court viewed the raid as the sort of political activity that is not encompassed within the political offense exception, especially when the tie to a larger political cause was ambiguous in that specific instance.[24]

We likewise conclude that the magistrate in this case was correct in holding that the alleged bombing directed at a civilian population was not incidental to political upheaval, however characterized, which was occurring at the time in Israel. Petitioner may not claim the benefit of the political offense exception clause contained in Article VI of the United States extradition Treaty with Israel.

CONCLUSION

We affirm the district court's conclusion that the magistrate was correct under the established law of this country in finding probable cause to believe petitioner guilty of the crime charged for which he could be extradited to Israel. However, the determination of whether the petitioner is actually guilty or not requires consideration of all the evidence at a trial within the jurisdiction where the act is alleged to have been committed. That is not for our courts to determine within the limitations of a probable cause hearing. We therefore uphold the magistrate's certification to the Secretary of State and the commitment of petitioner to jail[25] until he may be surrendered to Israel upon a warrant issuing from the proper authorities of that country's government.[26, 27]

Affirmed.

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and that it is alleged petitioner said he would avoid all contact with the Israeli military makes it clear that the explosion was meant to snare civilian victims. In any event those killed were children. There is nothing in the record to suggest the possibility of any Israeli military involvement in any way.

[24] The extradition treaty involved in *Ornelas v. Ruiz* apparently excepted crimes of a "purely political" character from its scope. It might be argued that the Supreme Court simply was distinguishing "pure" political offenses (treason, sedition and espionage), which never are extraditable, *see* Lubet & Czaczkes at 200, from situations where a petitioner claims he is accused of committing "relative" political crimes (common crimes with political overtones), which may not be extraditable, but which pose more difficult problems of proof. However, American courts "read the political offense exception broadly enough to bring in relative offenses," Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L.J. 71, 82 (1978), and the Supreme Court's discussion in *Ruiz* of the acts constituting the alleged crimes leaves no doubt that the specific treaty language made no difference to the political offense analysis: relative political crimes fell within the exception for "purely political" crimes. Otherwise, the Court need not have reviewed at length the specific acts alleged. A "pure" political offense exception clause, had it made any difference to the analysis, would have been determinative without further discussion.

At any rate, the only support we have found for a substantive distinction in American law between "pure" and "relative" political offenses under specific treaty language is contained in Garcia-Mora, 48 Virginia L.Rev. at 1232. However, Garcia-Mora goes on to cite an American treaty with language identical to that involved in this case, and says the language applies to except from extradition only pure political crimes. If Garcia-Mora is correct, then petitioner automatically is extraditable, since no one argues here that the acts of which he is accused constitute pure political offenses. The point was not argued in this case.

DEPARTMENT OF STATE
Washington, D.C. 20520

MEMORANDUM OF DECISION
IN THE CASE OF
THE REQUEST BY
THE STATE OF ISRAEL
FOR THE EXTRADITION OF
ZIYAD ABU EAIN

Summary and Decision

Ziyad Abu Eain is accused by the State of Israel of crimes which are claimed to subject him to extradition pursuant to the current 1963 Extradition Treaty between the United States and Israel. Acting in accordance with that treaty and implementing statutory law, Abu Eain was taken into custody by U.S. officials in response to Israel's request. A Magistrate for the United States District Court for the Northern District of Illinois, Eastern Division, determined after a hearing that Abu Eain should be extradited to stand trial in Israel. Abu Eain then sought a writ of habeas corpus from the District Court. After review of proceedings before the Magistrate, the petition for the writ was denied. The order of denial was affirmed on appeal by Abu Eain to the United States Court of Appeals for the Seventh Circuit. Thereafter the United States Supreme Court denied Abu Eain's petition for writ of certiorari.

Abu Eain, having exhausted all avenues of judicial relief, has petitioned the Department of State for relief on grounds hereinafter discussed. Having responsibility to make a final judgment on the question of extradition, I have carefully considered all matters asserted by Abu Eain, his legal counsel and diplomats who have requested opportunity to address the question of extradition. I have concluded that our treaty with Israel and compelling law require a conclusion that Abu Eain be extradited. I have today signed the warrant surrendering Abu Eain to the state seeking extradition.

In contesting extradition, Abu Eain has raised three contentions: the evidence is insufficient to sustain the Magistrate's finding that there is probable cause to believe Abu Eain committed the crimes for which extradition is requested; the crimes charged against him are political offenses and thus are not extraditable crimes; and if extradited, Abu Eain would not receive a fair trial. These all raise legal issues, and none other than legal contentions have been considered in arriving at today's decision. They will be addressed in the order stated.

Probable Cause

The Magistrate's finding of probable cause is based in large part on a statement of Jamal Hasan Ahmad Yasin (Yasin). In that statement Yasin confesses his own responsibility for the crimes charged against Abu Eain and implicates Abu Eain as an accomplice. Abu Eain contends Yasin's statement should not be considered because: (1) Yasin's statement is that of an accomplice and is therefore inherently unreliable; (2) Yasin's statement is not sufficiently corroborated by other evidence; (3) Yasin later recanted the statement insofar as it inculpates Abu Eain; (4) Yasin's statement was transcribed in Hebrew, rather than Yasin's native Arabic, and Yasin is not familiar with Hebrew; (5) the statement was taken under inherently coercive conditions; and (6) the statement is inherently incredible.

To facilitate discussion of these contentions, Yasin's statement will be summarized, and corroborating evidence will then be related.

According to an affidavit signed by Yasin: On May 11, 1979 Yasin drove from his home on the West Bank to Tiberias with the intention of selecting a location in which later to place a bomb. He was accompanied by his friend Abu Eain, whom he that day had enlisted in Al Fatah and in the Tiberias operation. On May 14, Yasin prepared a bomb with a timing mechanism and, after explaining how to set the mechanism, delivered the bomb to Abu Eain with instructions to place it in a refuse bin in Tiberias. Abu Eain left Yasin's home for Tiberias at 9:00 a.m. with the bomb. He returned at 4:30 p.m., stating that he had placed the bomb in a refuse bin in the center of a public market in Tiberias. The next day, May 15, Yasin met with Abu Eain and told him of news reports of a bomb's explosion in a market place in Tiberias, stating that "the operation had succeeded, that two persons had been killed and 36 injured." Sometime thereafter, upon learning that a comrade had been arrested, Yasin told Abu Eain that they were in danger and that Abu Eain should do nothing until contacted by Yasin. Two days later, Yasin's cousin, Mufida Jaber (Jaber), delivered a letter to Abu Eain. Jaber, later still, informed Yasin that Abu Eain had gone to America via Amman, Jordan.

According to an affidavit signed by Jaber (also claimed to have been recanted insofar as it incriminates Abu Eain): An intermediary gave Jaber a note from Yasin to deliver to Abu Eain. The note stated that named persons had been captured, and that Abu Eain should take care. At the time the note was delivered, Abu Eain asked Jaber where Yasin was. When she replied she did not know, Abu Eain told her he wished to go to America via Amman. She later reported Abu Eain's statement to Yasin.

According to an affidavit of an Israeli police officer in charge of investigating the Tiberias bombing: A time bomb hidden in a refuse bin in the center of a market in Tiberias had exploded on the afternoon of May 14, 1979 killing 2 boys and injuring 36 other people sufficiently to require hospital treatment for each of them.

There is also evidence that on May 20, 1979, six days after the bombing, Abu Eain obtained a visa to enter the United States. On June 14, 1979, having travelled via Jordan, Abu Eain arrived in Chicago, Illinois, where he took up residence with his sister and her husband. On August 17, 1979, when FBI agents went to that residence with a warrant for his arrest, Abu Eain then denied his identity.

Abu Eain's six attacks on the finding of probable cause will next be considered and evaluated.

(1) In response to the assertion that the statement of an accomplice must be deemed unreliable, it is well established that an uncorroborated statement of an accomplice may nevertheless be sufficient to establish probable cause. Indeed, in federal courts even a conviction can be based on uncorroborated accomplice testimony. The credibility of Yasin's statement is enhanced by the fact that it is contrary to his own penal interest; while it incriminates Abu Eain, it also establishes, without in any way mitigating, Yasin's own guilt.

(2) Although sufficient in itself to support a finding of probable cause, Yasin's statement is also corroborated in a number of significant respects. The Israeli investigating officer's statement confirmed that a time bomb placed in a refuse bin in the center of a market in Tiberias had exploded on the afternoon of May 14, 1979 killing 2 and injuring 36. Jaber's statement confirmed that she had delivered a note from Yasin to Abu Eain which stated that named persons had been captured and that Abu Eain should exercise care. Finally, under these circumstances, Abu Eain's flight to America and denial of his identity when first approached by officers in Chicago, although susceptible to innocent explanations, can be viewed as evidence of a consciousness of guilt for purposes of probable cause.

(3) Proffered evidence that both Yasin and Jaber later recanted their original statements insofar as they incriminated Abu Eain, is no more cognizable now than it was in the courts. In upholding the Magistrate's refusal to admit evidence of the alleged recantations, the Court of Appeals stated the well established rule. "An accused in an extradition hearing has no right to contradict the demanding country's proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof." To do otherwise would convert an extradition hearing into a full-scale trial, which it is not intended to be. An extradition proceeding is not a trial of the guilt or innocence of an accused but instead has the character of a preliminary examination in a criminal proceeding. Applying this rule, the Court of Appeals held: "The later statements /of Yasin and Jaber/ do not explain the government's evidence, rather they tend to contradict or challenge the credibility of the facts implicating petitioner in the bombing. Therefore, the Magistrate properly decided that such a contest should be resolved at trial in Israel. The alleged recantations are matters to be considered at the trial, not the extradition hearing." The considerations underlying the aforementioned rule are as compelling for the Department of State as they are for the courts.

(4) Admittedly, Yasin's first statement (as well as that of Jaber) was transcribed in Hebrew, rather than Yasin's native Arabic. The significance of this fact is nullified in large part by evidence received during the District Court hearing. Such evidence discloses that Judge Shabtay of the Magistrate's Court in Jerusalem questioned both Yasin and Jaber in Arabic, and determined they understood their statements and had made them freely.

(5) While Abu Eain asserts that Yasin's original statement was taken under "inherently coercive circumstances," he admits that Yasin's treatment while detained prior to the confession is "unknown." Indeed, the guarded manner in which this contention is stated -- that Yasin's statement was made "apparently without a prior opportunity to consult counsel, family or friend and after an unknown but likely period of weeks of detention" -- reveals its own weakness. Moreover, when Yasin allegedly recanted his earlier statement, he did not claim that he had incriminated Abu Eain because he had been coerced in any respect, but rather claimed that he had done so because he thought Abu Eain was safely out of the country.

(6) Finally, the contention that Yasin's original statement is on its face inherently incredible is patently without merit.

The Political Offense Exception

Abu Eain's contention that the crimes charged against him are political offenses -- and thus are not crimes for which he can be extradited -- was fully considered by the courts. After conducting an extensive hearing on the issue, the federal Magistrate held that the political offense exception was not applicable under the circumstances of this case. The District Court, in denying Abu Eain's petition for writ of habeas corpus, and the Court of Appeals, in affirming the order denying the petition for the writ, expressly agreed with the federal Magistrate's conclusion. The United States Supreme Court, in denying the petition for writ of certiorari, must be deemed to have rejected the claim of the political offense exception.

The standard relied upon by United States courts in determining applicability of the political offense exception is the "political incidence" test. Under that test, a common crime cannot be considered a political offense unless two conditions are first satisfied: the act must have been committed during a political uprising, involving a group of which the accused was a member, and the act must have been "incidental to" that uprising, that is, done in furtherance of or with the intention of assisting it. The placing of a time bomb in a market place with intent to kill civilians cannot be deemed to be "incidental to" a political uprising.

That is and must be the position of the United States. It is hoped that it would be the position of all nations. Anyone contemplating the murder of innocent civilians in a misguided effort to further a political cause must be on notice that he will not be permitted to take refuge under a political offense exception. I do not purport to determine that Abu Eain is in fact such a person. In addressing the issue of whether the political offense exception applies, I now conclude only that the crimes charged -- whether or not in fact committed -- are not political crimes. While the Department of State is the final arbiter of the question whether a charged crime is within the political offense exception in extradition proceedings, no reason appears in this case why the Department's determination should differ from the judicial determination.

I do not and need not for purposes of extradition make any decision on the question of Abu Eain's guilt or innocence. That determination can be made only by a trial court.

Fair Trial

Concern has been expressed by Abu Eain that he would not receive a fair trial if extradited to Israel. This concern appears to be based in large part on an assumption that he would be tried in a military court for security offenses.

We are now satisfied that this assumption is without basis. We have been formally assured by the Government of Israel that the crimes charged against Abu Eain -- murder, attempted murder and causing bodily harm with aggravating intent -- are common criminal charges which will be tried in an ordinary civilian court; that the conditions of Abu Eain's confinement pending trial and the place of his detention will be the same as in the case of any other civilian detainee accused of similar crimes; that he will be entitled to a speedy, public trial and to counsel of his choice; that he will be entitled to confidential interviews with his attorney on any workday during regular hours; that he will be entitled to weekly visits with family members and other persons; that normal rules of criminal procedure and evidence will prevail; and that the burden will be on the prosecution to establish guilt beyond a reasonable doubt. If convicted, Abu Eain would have the right to appeal the decision to the Israeli Supreme Court. Finally, the charges against Abu Eain do not subject him to the possibility of the death penalty. Abu Eain has stated that if he "could be assured of a just trial in an open system, /he/ would have nothing to fear." I believe he has those assurances.

Conclusion

In conclusion, I cannot agree with Abu Eain's contentions that there is a lack of probable cause when prevailing law requires that I give consideration to the Yasin statement. Nor can I agree for reasons stated that the crimes charged are within the political offense exception or that Abu Eain will not receive a just and fair trial within a judicial system not unlike our own systems. I thus conclude that compelling law, including our treaty with Israel, require that I sign the surrender warrant, and I have done so this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER OF THE REQUESTED EXTRADITION OF DESMOND MACKIN, BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND. : : :

80 Cr. Misc. 1, p. 54

OPINION

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NAOMI REICE BUCHWALD
UNITED STATES MAGISTRATE

The United Kingdom of Great Britain and Northern Ireland ("United Kingdom") has formally requested the extradition of Desmond Mackin ("Mackin") pursuant to the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland that entered into force on January 21, 1977 (the "Treaty").* 28 U.S.T. 227, T.I.A.S. 8486. Mackin, a native of Northern Ireland, has been indicted on charges of (a) attempted murder, contrary to common law; (b) wounding with intent to do grievous bodily harm, contrary to section 18 of the Offenses Against the Person Act of 1861 and (c) possession of firearms and ammunition with intent, contrary to section 14 of the Firearms Act (Northern Ireland) 1969. (Complaint, ¶ 5). After being released on bail, Mackin failed to appear for trial on September 25, 1979 and a bench warrant was issued for his arrest. (Complaint, ¶ 6).

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*In accord with Article XIV of the Treaty, the United Kingdom was represented in this proceeding by the United States Attorney's Office for the Southern District of New York.

Mackin was arrested in this district on October 6, 1980 pursuant to a provisional arrest warrant issued by the Honorable Irving Ben Cooper on the basis of a provisional extradition complaint. (Treaty, Article VIII). On November 19, 1980 a formal complaint requesting the extradition of Mackin was filed and a warrant of arrest issued on the same day by the Honorable Richard Owen. Mackin's motion for bail was denied by the Honorable Kevin Thomas Duffy on February 7, 1981. Thus, Mackin has been held without bail since his initial arrest.

The parameters of this extradition proceeding are established by the Treaty* and Chapter 209 of Title 18 of the United States Code, 18 U.S.C. §§ 3181-3185. The first issue raised in this proceeding** is whether Article IX(1) of the Treaty has been satisfied, i.e., has the United Kingdom submitted sufficient evidence for the court to establish probable cause to believe that Mackin committed the crimes for which he has been indicted. Article IX(1) provides:

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*"It is now well-established that the United States will honor an extradition request only pursuant to its treaty obligations." Lubet and Czackes, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 J. Crim. L. & Criminology 193, 197 (1980) (hereinafter referred to as "Lubet and Czackes"). And "[w]hile most states might nevertheless grant extradition requests in the absence of an express agreement, the United States will not even consider extradition unless pursuant to a treaty." Note, American Courts and Modern Terrorism: The Politics of Extradition, 13 N.Y.U. J. Int'l. & Pol. 617, 619 (1981). See also, Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960).

**By notice of motion, dated February 11, 1981, Mackin moved to dismiss the extradition request.

> Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.

The second issue is whether the provisions of Article V(1)(c), the so-called political exception, bar Mackin's extradition. Article V(1)(c) provides:

> (1) Extradition shall not be granted if:
>
> * * *
>
> (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or
>
> (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.

With the concurrence of counsel, these two issues were treated separately. The probable cause issue was heard first. An all-day hearing was held on February 20, 1981 and a decision finding probable cause rendered following oral argument on March 5, 1981. Thereafter, a seven-day hearing was held with respect to the political exception question. The transcript from the hearings totalled 1621 pages in length. Following submission of post-trial memoranda and proposed findings of fact and conclusions of law, post-hearing argument on the political exception issue was held on June 18, 1981. This opinion will set forth in detail, greater than was done at the March 5 argument, the Court's finding on the probable cause issue and will set forth our reasoning and holding on the applicability of the political exception.*

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*There is no dispute that a proper request for extradition was made by the United Kingdom. There is no challenge to the authenticity or certification of the documents submitted by the United Kingdom in support of its extradition request nor is there any question that the crimes charged are within the Schedule of Offenses referred to in Article III of the Treaty. Moreover, no challenge has been raised about the identity of Mackin, i.e., that the person arrested is the individual indicted in Northern Ireland.

PROBABLE CAUSE

It is well established that the probable cause standard utilized in this country to sustain an indictment or in preliminary examinations to hold an accused to answer in district court (Fed. R. Cr. P. 5.1) has been "regularly employed in extradition cases in the past." Sindona v. Grant, 619 F.2d 167, 175 (2d Cir. 1980)(citations omitted).** See also, Application of D'Amico, 185 F. Supp. 925, 928 (S.D.N.Y. 1960). Likewise, it is established in this Circuit at least that in determining the probable cause issue, United States national procedural law is applied and not the procedural law of New York. Sindona v. Grant, supra, 619 F.2d at 175. Probable cause has been described as "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." Coleman v. Burnett, 477 F.2d 1187, 1202 (D.C. Cir. 1973). The Supreme Court has described the probable cause standard in the following manner:

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*Transcripts of the hearings and oral arguments held have been filed with the Clerk of the Court.

**As noted earlier, no question of identity has been raised here.

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is correlative to what must be proved.

Brinegar v. United States, 338 U.S. 160, 174-75 (1949). Evidence to "block out" the essential elements of the crime is sufficient. Collins v. Loisel, 259 U.S. 309, 317 (1922).

By statute, 28 U.S.C. §3190, the demanding country's proof may be hearsay as may the Government's evidence in a domestic preliminary hearing. The respondent has a limited right to introduce evidence on the issue of probable cause. His evidence may explain "ambiguities or doubtful elements in the prima facie case made against him." Collins v. Loisel, supra, 259 U.S. at 315-16. Explaining further, the Court stated:

> The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in Charlton v. Kelly, supra, between evidence rebutting probable cause and evidence in defense. The court there said, "To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government."

Id. at 316-17.* See also, Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973).

Recently, Judge Griesa in Matter of Sindona, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) framed well the distinction between contradictory evidence and explanatory evidence and cited the established authority for the proposition that an extradition hearing should not be transformed into a full trial on the merits.

> The distinction between "contradictory evidence" and "explanatory evidence" is difficult to articulate. However, the purpose behind the rule is reasonably clear. In admitting "explanatory evidence," the intention is to afford an accused person the opportunity to present reasonably clear-cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause. The scope of this evidence is restricted to what is appropriate to an extradition hearing. The decisions are emphatic that the extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits. The Supreme Court has twice cited with approval a district court case which aptly summarizes the relevant considerations. The Supreme Court decisions are Collins v. Loisel, 259 U.S. 309, 316, 42 S.Ct. 469, 66 L.Ed. 956 (1922), and Charlton v. Kelly, 229 U.S. 447, 461, 33 S.Ct. 945, 57 L.Ed. 1274 (1913). The district court opinion is In re Wadge, 15 F. 864, 866 (S.D.N.Y. 1883), in which the court dealt with the argument of an extraditee that he should be given an extensive hearing in the extradition proceedings:
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> > "If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government

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*Consistent with these principles, proof that another was the perpetrator of the fraud is irrelevant to a finding of probable cause, (Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976)), as is evidence that other co-conspirators were acquitted. (Freedman v. United States, 437 F. Supp. 1252, 1267 (N.D. Ga. 1977).

> to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties."

However, it is largely within the discretion of the committing judicial officer to determine the extent that the respondent may offer explanatory proof. United States ex rel. Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963) cert. denied, 376 U.S. 952 (1964) (and cases cited therein).

The United Kingdom's Evidence On The Issue Of Probable Cause

In accordance with Article VII of the Treaty the United Kingdom filed with the complaint a packet of documents, under seal of the Consul General of the United States at London, England, including the Bench Warrant for Mackin's arrest issued after he failed to appear for trial, depositions taken in the course of preliminary hearing proceedings in Northern Ireland before a magistrate, other sworn statements of witnesses and documents (hereinafter referred to as "Documentary Evidence" or "Doc. Ev.").

In toto, five depositions recorded at the preliminary hearing were submitted and twenty five other statements, which were taken for use at the preliminary hearing. In accordance with the provisions of 18 U.S.C. §3190, the documents submitted under the certificate of the principal consular officer of the United States resident in the demanding country may be offered in evidence.

The United Kingdom's version of the shooting incident which gives rise to this request for extradition is contained in the deposition testimony of Soldier A (identified as Stephen Wooten)* taken before the Resident Magistrate in Belfast. Since this deposition is the focal point for the United Kingdom's probable cause submission, the statement portion will be quoted in full.

> On the 16th March 1978 I was stationed at Lisburn. At that time I was attached to the 39th infantry Brigade. On the 16th March 1978 I was on plain clothes duty in Andersonstown Belfast. I was carrying a Browning 9mm pistol I had 2 magazines of 13 rounds each with me. At approximately 1-20, pm I was standing at a bus stop on the Glen Road on the North side opposite the junction with Ramoan Gardens. When I was standing there I did not see any person or persons which attracted my attention. I saw 2 persons coming from an ally way between 82 Rossnareen Avenue and 300 Glen Road. These persons crossed the road and walked towards me. I recognised these 2 persons as Mackin and Gamble, when these 2 persons walked towards me I turned my back to them. When I did this the one, Mackin touched me on my shoulder and

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*Soldiers A, B, C and D are members of British Army stationed in Northern Ireland as part of the Security Forces.

turned me around to face him, when I turned round Gamble was about one pace behind Mackin. Mackin asked me who I was and what I was doing in the area, and he told me to remove my hands from my pockets. I removed my hands from my pockets and stepped back about 5 paces, when I did this Mackin put his right hand in his within his jacket as if to make a cross draw.

Gamble also was moving forward and seemed to be going for a cross draw. I drew my own weapon when I saw this. Gamble initially made the move to tackle me and I fired one aimed shot. We then fell to the ground in a struggle, my pistol was in my left hand when I fell to the ground in the struggle, I did not see any weapon in Gambles hands. During the course of the struggle I felt what appeared to be the barrell of a pistol against my right thigh. Gamble and I were fighting when I felt this. I felt a thump as if I had been kicked in the vicinity of my right thigh. Following this it became confusing and I remember ending up on the side walk on my own. As we struggled I did fire some more shots. When I found myself alone on the side walk I tried to stand up and fell back down again. The second time I tried I got to my feet. When I got to my feet I saw Soldier B covering a man lying on the grass in Ramoan Gardens. This area is marked with the word Green on the map in front of me marked exhibit 18. Soldier B had his weapon out. I saw Mackin running across toward 100 Ramoan Gardens, I walked around the outside of the green and sat down outside no. 76 Ramoan Gardens. As I walked around I took one aimed shot at Mackin. Soldier B told me to cover the man lying on the ground. I was sitting at house no 76 on the map marked exhibit 18. I was covering the man named Gamble. Soldier B was attempting to keep the civilians out of the area whilst I was covering Gamble. There were civilians in my immediate area, the number of civilians increased rapidly from about 5 to 30 or 40. A patrol from the Para Batallion arrived. When the patrol arrived I was told to wait by one of the patrols' land rovers. I was then taken in an ambulance to

> Musgrave Park Hospital. In the ambulance I handed my pistol to the Medical Orderly. The serial number of that pistol was 2T 965 and that is referred to as exhibit 11. I also handed over my ammunition and I ascertained I had fired 13 shots on that occasion. I ascertained I had received a gunshot wound through the right thigh and a bullet in my inside left thigh. I was in Hospital approximately 3 weeks.

(Doc. Ev. 10-12). Also included in the submission of the United Kingdom is a sworn statement of Soldier A taken at an earlier date in which Soldier A stated:

> As they approached, I recognized them as Mackin and Gamble. Mackin was wearing a blue bomber jacket, and Gamble was wearing a blue snorkel jacket. I was able to recognize them because I had been operating in the Andersonstown area, and have been familiarised with the photographs and descriptions of persons who were of relevance to me duties.

(Doc. Ev. 16).

Soldier B was also on plain clothes duty in the Andersonstown area of Belfast on March 16, 1978. From a parked vehicle he recognized Mackin and Gamble and saw the exchange between them and Soldier A. He states that Mackin:

> produced the gun form [sic] inside his coat from the area of his waistband. When he produced the gun he fired. I heard two or possibly three shots. Mackin fired the gun in the direction of Soldier "A." Soldier "A" was struggling with Gamble on the ground when these shots were fired at him.

(Doc. Ev. 19). Upon seeing Mackin fire at Soldier A, Soldier B left his vehicle and shot at Mackin who started to run away under fire from Soldier B. When Mackin was out of range, Soldier B began shooting at Gamble, who fell after he was hit. Soldier B asked Soldier A to cover Gamble and then went down the alleyway in the direction that Mackin had taken. He found Soldier C and Soldier D guarding Mackin. Soldier B had fired sixteen rounds. The deposition of Soldier B appears at pages 18-25 of the United Kingdom's Documentary Evidence submission.

Soldier C, also in plainclothes and armed, was patrolling the area in a car. When he saw the scuffle between Soldier A, Mackin and Gamble in his rear view mirror he reversed his car and jumped out of it. He chased the man (Mackin) whom Soldier B had been shooting at. He confronted Mackin, whom he recognized, at the rear of a row of houses. (Doc. Ev. 30, 37). Soldier C fired two shots at Mackin who was behind a coal bunker and shouted at him to stand up. Before Mackin stood up, Soldier C testified that "he said something to the effect that 'Don't shoot me I've thrown my gun away in the grass.'" (Doc. Ev. 30).* Soldier D then joined Soldier C, keeping Mackin under guard until other members of the Security Forces arrived and took him into custody. Soldier C's statement appears at pages 29-38 of the Documentary Evidence.

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*No guns were ever found.

Soldier D, similarly in plainclothes and armed, heard shots and saw Soldier B leave his car with his gun drawn. Nearing the area where the shots were coming from he "saw a man that I recognized as Mackin . . . holding a handgun in his right hand, Mackin seemed to fall towards the ground as he fell toward the ground he fired a single shot toward a body on the ground." (Doc. Ev. 39). Upon seeing Mackin start to run, he tried to block a possible escape route. He then saw Soldier C and followed him down a small alleyway where he observed Mackin behind a coal bunker and saw Soldier C fire a shot at Mackin. With Soldier C he guarded Mackin until he was handed over to other members of the Security Forces. Soldier D's testimony may be found at pages 39-50 of the Documentary Evidence.

The documentary material submitted by the United Kingdom also included the sworn statement of the doctor who treated Soldier A who described the bullet path as "entered below and behind right hip, exited on innerside right thigh and re-entered left Buttock." (Doc. Ev. 59). Other statements were submitted to establish custody of exhibits.

The deposition and statement of James Smyth Wallace, a forensic scientist with the Northern Ireland Forensic Science Laboratory, and the statement of Leo Rossi, also on staff at the same laboratory, figured prominently in the hearing on the probable cause issue. Wallace's testimony was on the subject of firearms residue and Rossi's on the subject of ballistics.

Also included in the documentary evidence were statements of Royal Ulster Constabulary police officers who interviewed Mackin while he was hospitalized after the shooting incident. (Doc. Ev. 87-100). Statements by Mackin and Gamble taken at the hospital seven days after the shooting are found at pages 101-04 of the Documentary Evidence.

The Probable Cause Hearing

Respondent Mackin called Dr. Dominick J. DiMaio, formerly Chief Medical Examiner of the City of New York (2),* as his expert witness.** The Government called FBI Special Agent Rodger A. Asbury, as its ballistics expert*** and Dr. Brian W. Blackbourne, Deputy Chief Medical Examiner for the

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*All page references in parenthesis are to the transcript of the hearings held on the probable cause and political exception issues. The Government's exhibits are referred to as "Gov't. Ex." and the respondent's as "Resp. Ex."

**Dr. DiMaio, who specializes in forensic science and medicine, is a certified pathologist with certification in pathological anatomy, clinical pathology, forensic pathology and is a diplomate in nuclear medicine. (19-20). He has personally performed over 20,000 autopsies and supervised, assisted or reviewed an additional 45,000 autopsies, including thousands of gunshot cases. (23-24). In connection with his work as a medical examiner, Dr. DiMaio became familiar with firearms (26) and specifically with .38 caliber weapons and bullets. (32-33). He has testified at several thousand trials involving the shooting of and wounding by firearms. (35).

***Special Agent Asbury is an examiner in the FBI Laboratory, Washington, D.C., currently and for the last three years assigned to the elemental analysis unit and previously assigned to the ballistics unit. (152-53). His prior background is unrelated to his testimony. (153-54).

District of Columbia as its expert in forensic pathology.*

Dr. DiMaio's testimony proceeded on the assumed truth of the Documentary Evidence submitted by the Government of Great Britain and his opinions were proffered under the same standard of accuracy he utilized as Chief Medical Examiner. (148). Dr. DiMaio was called to establish two propositions: first, that Mackin could not have fired the bullet that lodged in Soldier A, and, second, that the forensic evidence did not support a conclusion that Mackin had a gun.

Dr. DiMaio testified that a .38 caliber bullet is discharged from a .38 caliber revolver at a velocity ranging from 750 to 1090 feet per second.** Based on the United Kingdom's submission, Dr. DiMaio assumed that Mackin fired the bullet from 20 feet away, and concluded that the bullet, not having hit bone in Soldier A's body, would have passed through the soft tissue* and exited. Dr. DiMaio stated further that the minimum distance from which the bullet would have had to have been fired in order to have remained in Soldier A's body was 100 feet. Interestingly, Agent Asbury found that to be a very conservative opinion since bullets do not slow down significantly in 100 feet. (181-82). The suggestion was advanced on cross-examination that the bullet could have lodged in Soldier A's body because it ricocheted off another surface before entry or because it was hollow-nosed. Dr. DiMaio concluded based on the United Kingdom's ballistics report, which did not describe the bullet as damaged or hollow-nosed, that the bullet did not ricochet off another surface prior to entering Soldier A's body (117) and that the bullet was solid. (105). Again, we agree with the respondent's position on the inferences which may be drawn from the ballistics report. Both Dr. DiMaio and Special Agent Asbury agree that damage to the bullet is important to a ballistics investigator. (137, 199). Likewise, whether a bullet is hollow-nosed is also significant as it is designed to mushroom upon impact (223), causing another type of deformity which would be important to a ballistics investigator. Thus, Dr. Blackbourne also testified in response to a question as to whether he would so state in an autopsy report: "In an autopsy report I routinely describe the bullet as to its caliber and to any special things like metal jacket or deformity or flattening or whatever, yes." (239).

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*Dr. Blackbourne teaches and lectures on the subject of forensic pathology and has testified in court approximately 250 times on matters of forensic evidence and the effect of gunshot wounds. (222-23).

**The Government established on cross-examination that there are a number of variables, such as barrel length and manufacturer, which can affect the velocity of the bullet. However, the Government's ballistics witness, FBI Special Agent Rodger A. Asbury, could not say how much the velocity would be affected. (176). Further, Agent Asbury agreed with Dr. DiMaio's statement that under normal circumstances a .38 caliber bullet travels at least at 750 feet per second. (171). He testified that the rifling pattern on the bullet was consistent with a cheaper weapon, which has a somewhat slower velocity. (174).

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*One of the issues at the probable cause hearing was whether it was proper to draw certain negative conclusions from the absence of contrary information in the United Kingdom's submission. One example of this problem was whether Dr. DiMaio, and ultimately the Court, could conclude that the bullet which entered Soldier A did not strike bone given that Soldier A's treating physician's report (Doc. Ev. 59) contained no such mention. Dr. DiMaio testified that the striking of bone is a significant item to an investigator, that such information should have been included in a report of this type (144), and therefore ruled out the possibility that the bullet hit the spine, for example. (101). Dr. Blackbourne, on the other hand, did not feel in a position to make a conclusion on this subject given the lack of detail in the report. (224). We conclude that in an appropriate instance, it is permissible for an inference to be drawn against the demanding country given the burden of proof on the issue of probable cause and the opportunity for the demanding country to supplement its submission. In this instance, we conclude that the inference drawn by Dr. DiMaio is an appropriate one.

The Government's rebuttal on this aspect of Dr. DiMaio's testimony was twofold. First, as indicated earlier, the Government established that there are a number of variables which affect the velocity of a bullet, although no evidence was offered on precisely what that effect was. Second, the Government proffered the testimony of Dr. Blackbourne who disputed Dr. DiMaio's deduction that the bullet must have travelled a distance considerably more than 20 feet, given that it had lodged in Soldier A.* The only specific example which Dr. Blackbourne relied upon was a case in his office the week before. As the cross-examination of Dr. Blackbourne established, the case referred to involved a hollow-nosed bullet, which is designed to lodge in the body (233), and which travelled through the body in a considerably different way from the bullet which hit Soldier A. (237-38). Thus, I find Dr. DiMaio's testimony unrefuted by Dr. Blackbourne's.

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*Agent Asbury testified that he has no experience on how bullets react inside bodies. (178).

Mackin also attacks Great Britain's submission on the ground that it failed to demonstrate probable cause to believe that Mackin had a gun. Although I have held, and adhere to my earlier ruling, that the eyewitness testimony of the British soldiers, in particular Soldiers A and B, is sufficient to find that there is probable cause to believe that Mackin had a gun and fired it, nevertheless, I will review the forensic testimony on this issue so that any reviewing body can have a complete understanding of the record.

Respondent's proof on this issue was in two parts: first, the testimony of Dr. DiMaio and, second, his proffer of the trial testimony of the United Kingdom's forensic expert, James Smythe Wallace, at the retrial of Mackin's co-defendant, Robert Gamble.

Dr. DiMaio reviewed the Wallace deposition testimony and his statement, which were included in the Documentary Evidence. Based on Wallace's statement that no firearms residue (_i.e._, residues of lead, antimony and barium) was detected after testing on Mackin's trousers or on the right cuff of his jacket,* Dr. DiMaio concluded that there was no gun in Mackin's trousers and that he had not fired a gun right-handed, as the eyewitness had testified. (51). In Dr. DiMaio's view, the absence of residue was decisive given that a revolver was involved in the shooting incident. (70, 120-21). However, Dr. DiMaio had not considered the possibility that Mackin's right cuff had been turned up (126) nor did he have any ready explanation for why the car residue was not on Mackin's cuff. (131-32). He conceded that a failure to test the inside would support the hypothesis that the right cuff of Mackin's jacket was turned up. (132).

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*Mackin's jacket and gloves were heavily contaminated with residue. All the witnesses agreed that those residues were consistent with Mackin's employment as a taxi driver and his consequent contact with car batteries.

As noted above, on the issue of weapon possession, Mackin also relied on the trial testimony of James Smythe Wallace, whose earlier testimony before the magistrate in Northern Ireland and sworn statement had been submitted by the United Kingdom. Wallace's testimony was received over the Government's objection. (2-17).*

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*There were three grounds for the objection: first, that Mackin had not obtained the proper certification in accordance with 18 U.S.C. §3190 and that he could not avail himself of the evidentiary benefits of that section; second, that it was improper for the Court to rely on the Federal Rules of Evidence to admit the testimony since Rule 1101 thereof makes them inapplicable to extradition proceedings; and third, that the material was outside the proper scope of the extradition hearing. Taking each argument in turn, the first became moot when Mackin eventually obtained a certification from the Vice Consul of the United States at Belfast, Northern Ireland. And having obtained that certification, the issue in the Court's view was one of evidence admissibility alone. Second, I cannot agree with the Government's reading at Fed. R. Ev. 1101(d)(3), which makes the Federal Rules of Evidence inapplicable to extradition proceedings. That rule relaxes the evidentiary standard at an extradition proceeding; it does not mean that evidence admissible under strict rules of evidence may not be admitted. Weinstein and Berger, Weinstein's Evidence, ¶1101 (1978). Specifically, the trial testimony was received under Rules 106 and 804 of the Federal Rules of Evidence. Finally, with respect to the Government's last argument, that the Wallace testimony is irrelevant as being outside the scope of an extradition hearing, I have ruled that the testimony is relevant as explanatory, and not contradictory, of the earlier statements submitted by the United Kingdom. It should be noted that the testimony was not admitted on the ground that Great Britain had to produce

Footnote continued on p. 19

Wallace's testimony (Resp. Ex. A) contained the following questions and answers which are of particular relevance:

> Q.22 Do you know of any circumstances in this case which would cause you to be less surprised that you did not find any residue on the right-hand cuff? A. In this case, I know of no circumstances where the residue should not be detected.
>
> Q.34 If you would have expected to find residues in the waistband where the gun had been and you did not find any, what does that allow you to say? A. We cannot take it as far as to say there was never a gun in the waistband of the trousers. All we can say is that nothing was found to suggest that there was ever a gun in the waistband of the trousers.
>
> Q.59 But in that event you would then have a high concentration on the inside of the cuff? A. We do not actually examine the inside of the cuffs, My Lord.
>
> Q.60 Did you look to see if there was any evidence of the cuffs having been turned back? A. No. They were not turned back when we received them.

In sum, Wallace's testimony, while not in accord with DiMaio's that negative results are dispositive, nevertheless offered no positive basis to conclude that Mackin had a gun or shot one.

Special Agent Asbury disputed Dr. DiMaio's conclusion that the absence of residue is dispositive. (162-69; 184-88). However, he did agree in response to a question from the Court

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Footnote continued from p. 18

exculpatory material. Matter of Sindona, supra, 450 F. Supp. at 687. Moreover, we recognize that 18 U.S.C. §3500 does not apply to preliminary hearings in this country, e.g., Robbins v. United States, 476 F.2d 26 (10th Cir. 1973).

and on cross-examination that it is more likely than not that residue would be found if a gun had been fired. (188-89; 212-13).

Were it not for the fact that the underside of Mackin's cuff had not been tested for firearms residue, the totality of testimony of the expert witnesses for both sides would lead to a conclusion that it was more likely than not that Mackin did not have a weapon in the waistband of his trousers and did not fire one. However, the fact that the underside of his cuff was not tested leaves open the possibility that his cuff was turned up when he shot the revolver, a result consistent with the testimony of the eyewitnesses.

With respect to our reliance on the testimony of Soldiers A, B, C and D in finding probable cause, respondent has suggested that it is our obligation to weigh Mackin's statement against the soldiers' testimony since all were submitted by the United Kingdom. (322-30). We declined the invitation noting that the committing magistrate is not the trier of the fact and that a contrary conclusion would dissuade the requesting country from submitting a defendant's statement, a result that would not aid a full hearing of the relevant facts. Moreover, were respondent's position accepted, all a defendant need do was to take the stand in order to transform a probable cause hearing into a prohibited mini-trial. See discussion, supra, at 6-7..

In sum, if the sole issue was whether the bullet that lodged in Soldier A was fired from respondent's gun, we would find that the United Kingdom had not demonstrated probable cause. However, the other issue was whether Mackin had a gun and fired it. On that issue, we cannot say that the expert testimony of respondent negated the probable cause established by the sworn eyewitness statements of the demanding country.

THE POLITICAL OFFENSE EXCEPTION

Introduction

After a finding of sufficient probable cause was made to certify extradition, respondent Desmond Mackin was afforded the opportunity to submit evidence in support of his contention that extradition is nevertheless barred by the so-called political offense exception set forth in Article V, subsections (1)(c)(i) and (1)(c)(ii) of the Treaty. Testimony was received from three expert witnesses and Mackin on behalf of the respondent and four expert witnesses on behalf of the United Kingdom.

The language in Article V embodying the political offense exception is as follows.

> (1) Extradition shall not be granted if:
>
> (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or
>
> (ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character.*

The drafters of the treaty did not provide any further definition of the exception, apparently following the opinion of Justice Denman in In re Castioni, [1891] 1 Q.B. 149, the landmark English case which construed the phrase "offence of

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*It should be noted at the outset that our analysis and opinion in no way bears on subsection (1)(c)(ii) of Article V of the Treaty since a determination of whether the extradition is sought as a subterfuge to punish the respondent for a political offense is deferred to the Secretary of State and is not a matter which may be properly considered by the judiciary. Abu Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981); Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir.),

Footnote continued on p. 23

a political character." Justice Denman stated that it was not "necessary or desirable . . . to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character." *In re Castioni*, *supra*, 1 Q.B. at 155. Thus, the broad language of the Treaty suggests that the political offense exception is to be viewed as a flexible concept whose parameters can be measured only by factual application. *See, also*, *In re Gonzalez*, 217 F. Supp. 717, 721, n. 9 (S.D.N.Y. 1963), *quoting*, *In re Castioni*.

I. THE POLITICAL OFFENSE EXCEPTION

A. "Pure" and "Relative" Political Offenses

Traditionally, the "political offense" concept has been applied to two factually different but related types of criminal acts, designated respectively as "purely political offenses" and "relative political offenses." "Pure" political offenses "encompass acts directed against the state which contain none of the elements of ordinary crime." Garcia-Mora, "The Nature of Political Offenses: A Knotty Problem of Extradition Law," 48 Virginia L. Rev. 1226, 1230 (1962) (hereinafter referred to as "Garcia-Mora"). By its terms "pure" political offenses have usually been limited to treason, sedition and espionage. Cantrell, "The Political Offense Exemption In International Extradition: A Comparison Of The United States, Great Britain And The Republic Of

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Footnote continued from p. 22
cert. denied, 429 U.S. 833 (1976). To the extent that *Sindona* v. *Grant*, *supra*, 619 F.2d at 173-74, can be read as requiring a judicial determination that there is an independent and "substantial" basis for the prosecution, we find that the showing has been made here. *See als* jurisdictional discussion, *infra*, at 36-43.

Ireland," 60 Marq. L. Rev. 777, 780 (1977) (hereinafter referred to as "Cantrell"). Since respondent Mackin does not contend that his acts fall within the narrow scope of this political offense exemption to extradition, no further discussion of the "pure" political offense is necessary.

Mackin does urge that his conduct as charged constituted a "relative" political offense and is therefore, as contemplated by the treaty drafters, a non-extraditable offense. A "relative" political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political." Garcia-Mora, supra, at 1230-31. There is no dispute that the test set forth by the English Court in In re Castioni frames the proper inquiry for determining whether in the case before this Court the offense shall be held a non-extraditable, "relative" political offense. The Court in In re Castioni stated that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." Supra, 1 Q.B. at 166.* Stated another

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*The political offense question was presented to the In re Castioni Court in the context of interpreting the British Extradition Act of 1870 which provided in pertinent part that:

> [a] fugitive criminal shall not be surrendered if the offence in respect to which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police, magistrate or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

33 & 34 Vict., c. 52, §3(1).

Footnote continued on p. 25.

way, there are two conditions that must be met in order to conclude that an otherwise criminal act should be deemed a political offense: first, there must be ". . . a political matter, a political rising, or a dispute between two parties in the State, as to which is to have the government in its hands . . ." and second, the act for which extradition is requested must have been done in furtherance of or with the intention of assisting a political uprising. In re Castioni, supra, 1 Q.B. at 156.

Accordingly, in In re Castioni, the Court denied the extradition of the petitioner, when faced with a request from the Swiss Government, which alleged that Castioni murdered a member of the Government in the course of an uprising by a number of citizens who broke into and took forcible possession of a municipal palace. Inquiring whether "the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part," id. at 159, the Court concluded that Castioni, was indeed a member

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Footnote continued from p. 24

A comparison of the language of the British Extradition Act and the current Extradition Treaty in force between the United States and Great Britain reveals substantial similarity regarding the standard and terms of the political offender exemption to extradition.

of the uprising group and that there was a sufficient nexus between his acts and the political insurrection to regard his acts as "political" and therefore nonextraditable.

The standard enunciated in In re Castioni, was further clarified by the English courts in In re Meunier, [1894] 2 Q.B. 415. While consistent with the In re Castioni so-called "incidence" test, the Court in In re Meunier refused to countenance a perversion of the political offense exception and permit the acts of an avowed anarchist to go unsanctioned.* In denying Meunier's habeas corpus petition the Court instructively reasoned:

> in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party whom the accused is identified by the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all Government. Their efforts are directed primarily against the general body of citizens.

In re Meunier, supra, 2 Q.B. at 419.

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*The French Government requested the extradition of Meunier for murder, attempted murder and willful damage to buildings which resulted from setting off various explosive devices at a cafe in Paris and certain military barracks.

B. The History Of The Political Offense Exception In American Jurisprudence

The American judiciary has adopted, without any substantial deviation, the standard set forth in In re Castioni and its clarification in In re Meunier, beginning with its application in In re Ezeta, 62 F. 972 (N.D. Cal. 1894)* and most recently in Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).** Thus, the term "political offense" has uniformly been construed to encompass those offenses that are "incidental to severe political disturbances such as war, revolution and rebellion."*** Sindona v. Grant, supra, 619 F.2d at 173, citing, e.g., Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972); Jimenez

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*In grappling with the meaning of the term "offense of a political character," the Court in In re Ezeta, supra, 62 F. at 997-99 quoted extensively and with approval the decision in In re Castioni.

**Abu Eain v. Wilkes is the first American case to adopt and rely on the clarification enunciated in In re Meunier.

***The American judiciary has not followed the more recent approach of the British Courts, which have allowed the "political offense" exception to be raised in the absence of a political disturbance in the requesting country, determining instead whether the defendant's acts were politically motivated and directed toward political ends. Regina v. Governor of Brixton Prison, ex parte Kolczynski, [1954] 1 Q.B. 540. Cf. Garcia-Guillern v. United States, supra, 450 F.2d at 1192; Escobedo v. United States, 623 F.2d 1098, 1104 (5th Cir. 1980); Abu Eain v. Wilkes, supra, 641 F.2d at 519. The only positive recognition of the "motive" analysis by American courts was in dicta in In re Gonzalez, supra, 217 F. Supp. at 721, n. 9.

The narrow interpretation given the political offense exception by American courts has been severely criticized by several commentators. Specifically, a commentary has asserted that it tends to be both "underinclusive and overinclusive, . . . exempt[ing] from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising." Lubet and Czackes, supra, at 203. We mention this for the sake of the completeness of our discussion intending no departure from the well established In re Castioni standa adopted by our courts nor any judgment regarding the validity of the standard.

v. *Aristeguieta*, 311 F.2d 547, 560 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *In re Ezeta*, 62 F. 972, 977-1002 (N.D. Cal. 1894) and generally citing Garcia-Mora at 1244-49.* It should be noted that in reciting the test various linguistic formulations have been used to define the political offense exception. For example,

> [a] political offense under the extradition treaties, must involve an "*uprising*" or some other violent political disturbance. Moreover the act in question must have been incidental to the occurrence in order to justify the exclusion.

Garcia-Guillern v. *United States*, *supra*, 450 F.2d at 1192 (emphasis added). Alternatively, a political offense has been described as:

> [a]ny offense committed in the *course of or furthering of civil war, insurrection, or political commotion*.

In re Ezeta, *supra*, 62 F. at 998 (emphasis added), *quoting* John Stuart Mill, Hansard's Debates, Vol 184, p. 2115, and *quoted in*, *Ramos* v. *Diaz*, 179 F. Supp. 459, 462 (S.D. Fla. 1959). To attempt to harmonize these seemingly different definitions to arrive at the optimum combination of words which would crystallize the meaning of the political offense exception appears to be a rather fruitless effort which we shall not attempt. Rather, it is more instructive to review its application in some of the seminal cases which have been decided by the American courts.

**See also*, *Abu Eain* v. *Wilkes*, *supra*, 641 F.2d at 518 (and citations therein).

In *In re Ezeta* the Government of Salvador sought the extradition of General Ezeta and others on charges of murder and robbery. In denying the extradition request and finding that the offenses with which the accused were charged were political offenses, the Court premised its decision on the testimony adduced which showed that the alleged acts were committed during the "progress of actual hostilities between the contending forces, wherein Gen. Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising." *Supra*, 62 F. at 997. Thus, there can be no question that the Court in *In re Ezeta* found that the alleged acts were nonextraditable because they were *incidental* to a political uprising. Indeed, regarding one of the acts, which was allegedly committed four months before the revolution, the Court held that it was not within the scope of the "political offense" exception since it was "free from any political aspect. . . ." *In re Ezeta*, *supra*, 62 F. at 986.

Two years later the Supreme Court affirmed and significantly clarified the use of the "incidence" test in *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896), which is the only statement from that Court regarding the political offense exception. In *Ornelas* the Republic of Mexico sought the extradition of three individuals who had crossed the Rio Grande from Texas into Mexico with a band of approximately 140 other armed men, and then acting as part of the group, attacked forty Mexican soldiers and terrorized a town and its citizens. Specifically, the petitioners were charged with murder, arson, robbery and kidnapping, acts allegedly committed during the course of the raid. Despite the avowed aims of the petitioners, i.e., "to cross over the river and fight against the Government," id. at 511, the Court, noting that the band remained in Mexico for only a total of six hours before returning to Texas, id. at 510, held that the offenses were not of a political character since the revolutionaries were not engaged in any combat with Mexican armed forces at the time the crime was committed. Id. at 510-11. Furthermore, given the "character of the foray, the mode of attack, the persons killed or captured, and the kinds of property taken or destroyed" the Court concluded that the acts of petitioners were not in aid of a political revolt, an insurrection or a civil war. . . ." Id. at 511. Thus, the Supreme Court interpreted the political offense exemption to require a showing that the defendants' actions were in furtherance of a political revolt in addition to being contemporaneous with the political disturbance.*

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*Although the extradition treaty specifically interpreted in Ornelas v. Ruiz, excepted offenses of a "purely political character" from its application, supra, at 506, the Supreme Court's inquiry and discussion regarding the nature of the specific acts alleged, leaves no room for argument that the Court was, in reliance on the language of the treaty, simply construing the "pure" political offense rather than the "relative" political offense.

With the exception of United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383, 392-93 (S.D. Cal. 1959)* which in dicta adopted the earlier Ninth Circuit opinion, Karadzole v. Artukovic, supra, 247 F.2d,** which found the political exception applicable without inquiring, as did the Supreme Court in Ornelas

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*This is the final decision in the history of decisions involving the extradition of Artukovic. See, Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), rev'd sub nom. Ivancevic v. Artukovic, 211 F.2d 565, (9th Cir.) cert. denied, 348 U.S. 818, rehearing denied, 348 U.S. 889 (1954); Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956), aff'd sub nom. Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), vacated, 355 U.S. 393 (1958), decision on remand sub nom. United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

**The Government of Yugoslavia requested the extradition of Artukovic, the former Minister of Internal Affairs in Croatia for allegedly ordering the murder of 200,000 inmates of concentration camps during World War II. In the final decision, United States ex rel. Karadzole v. Artukovic, supra, 170 F. Supp. the Court held that the evidence was insufficient to support a finding of probable cause, but nevertheless adopted the earlier Court of Appeals decision with respect to the political offense exception. In both the District Court and Court of Appeals decisions the statement of the political offense exception test was consistent with In re Castioni, In re Ezeta and Ornelas v. Ruiz. Indeed, in defining the term the District Court aptly stated:

> "Political character" or political offense has not been too satisfactorily defined. Generally speaking it is an offense against the government itself or incident to political uprisings. It is not a political offense because the crime was committed by a politician. The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power.

United States ex rel. Karadzole v. Artukovic, supra, 170 F. Supp. at 392. And, the decision of the Court of Appeals, Karadzole v. Artukovic, supra, 247 F.2d at 202-03, quoted extensively from In re Castioni. However, in applying the standard to the facts,

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v. Ruiz as to whether the accused committed the offense in furtherance of a political revolt, American courts have consistently approached the political offense exception as a two-part inquiry.* In Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla.

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the Ninth Circuit and District Court relied exclusively on the fact that the alleged offenses occurred during a period of rampant civil strife, subsequent to the German invasion of Yugoslavia, when "various factions representing different theories of government were struggling for power . . . in Croatia." Karadzole v. Artukovic, supra, 247 F.2d at 204. See, United States ex rel. Karadzole v. Artukovic, supra, 170 F. Supp. at 392-93.

While not the ultimate holding, this conclusion has been sharply criticized because "it places greater emphasis on the timing of the defendant's acts than on whether he in any sense furthered a political revolt. Both the circuit and district courts refused to interpret war crimes against civilians as being beyond the purview of the Castolini (sic) test." Lubet and Czackes, supra, at 205. Specifically as this commentary notes, neither court considered the civilian status of the defendant's alleged victims nor analyzed or considered the nexus between the genocide and the political struggle to determine whether the mass killing could be considered in furtherance of a political end. Id. at 204-05. See also, Cantrell, supra, at 795-96; Garcia-Mora, supra, at 1246-47. And indeed, the Court in Abu Eain v. Wilkes, supra, 641 F.2d at 522 seemed to recognize the problematic reasoning of the Artukovic Courts.

*It should be noted that the inquiry of the American courts with respect to the political offense exception has been less extensive and has not necessarily focused on the "in furtherance of" requirement where the defense has been raised to charges of financial crimes, which have consistently been held outside the scope of the political offense exemption. See, e.g., Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir.), cert. denied, 429 U.S. 833 (1976); Garcia-Guillern v. United States, supra, 450 F.2d at 1192; In re Locatelli, 468 F. Supp. 568 (S.D.N.Y. 1979); Gallina v. Fraser, 278 F.2d 77 (2d Cir.), cert. denied, 364 U.S. 851 (1960).

1959), the Government of the Republic of Cuba requested the extradition of two former soldiers who had escaped from a Cuban prison after having been convicted of murdering a prisoner, who had been mistakenly arrested as a Batista supporter, immediately after the fall of the Batista Government and the institution of the Communist regime of Fidel Castro. Finding that the commission of the alleged crime took place in the "early days of victory" of the revolutionary faction, that the defendants were active participants in that revolutionary movement, and that the alleged crime was "part of a political uprising and disturbance," the Court concluded that the defendants "bore no ill will or malice toward their victim, who was just one of the many political prisoners captured in furtherance of the political rising." Ramos v. Diaz, supra, 179 F. Supp. at 463. (emphasis added). Accordingly, the Court held that the alleged crime was a nonextraditable political offense.* Id. at 463-64.

Furthermore, in the most current topical contexts the courts have interpreted the political offense exception to require a showing that the crime with which the extraditee was charged was "incidental to" or "in furtherance of" a political uprising. In In re McMullen, Magis. No. 3-78-1099 MG (N.D. Cal., filed May 11, 1979) the Government of the United Kingdom sought the extradition of McMullen, an established member of the Provisional Irish Republican Army (the "PIRA") for the alleged bombing of a certain British Army installation. After restating the applicable test, the Court found that: (1) an "insurrection and disruptive uprising of a political nature" did exist at the time of the alleged bombing, In re McMullen, supra, at 4; (2) the British Army and its military facilities were main targets for the PIRA'S activities; and that (3) with respect to the crime charged, McMullen acted as a member of the PIRA. The Court concluded that the defendant's acts were not a product of his own vengeance or personal motivation, but that the "bombing was a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof." Id. at 5-6.

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*We mention that a contrary result was reached in In re Gonzalez, supra, 217 F. Supp. at 721, where the Court found that there was no "uprising" or "political disturbance" in the requesting country, the Dominican Republic, at the time the alleged crimes were committed. In that case the Government of the Dominican Republic had requested the extradition of Gonzalez, who had been acting in a military or quasi-military position under the regime of Generalissimo Rafael Trujillo, for participating in the torture and killing of two prisoners. Apparently the Trujillo regime fell approximately nine months after the commission of the charged crime when Trujillo was assassinated. In re Gonzalez, supra, 217 F. Supp. at 719 & n. 1.

And most recently in Abu Eain v. Wilkes, the Court was faced with a request from the State of Israel, seeking the extradition of Abu Eain, an alleged member of the Al Fatah branch of the Palestine Liberation Organization ("PLO"), charging that the defendant had set off a bomb in the marketplace of the Israeli city of Tiberius, killing two boys and maiming or otherwise injuring more than thirty other people. While the Court in Abu Eain questioned the Magistrate's finding of a "conflict" sufficient to establish that there was a violent political disturbance, such as a war, revolution or rebellion, in Israel at the time of the alleged bombing, the Court held that, in any event, the petitioner had failed to establish that the bombing was "incidental" to the PLO'S objectives and that "[a]bsent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which may be reasonably 'incidental to' a political disturbance." Supra, 641 F.2d at 520. The Court, relying on the doctrine set forth in In re Meunier, recognized that the "political offense" doctrine should not be interpreted to legitimize anarchistic activities which by their nature impact on the citizenry and not directly upon the government. Abu Eain v. Wilkes, supra, 641 F.2d at 520-521. Thus, the Court reasoned:

> [t]he exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.

Id. at 521.

II. THE THRESHOLD ISSUES

A. Jurisdiction

Having thus treated the development and application of the political offense exception in American jurisprudence, we now turn to the argument advanced by the Government that the judicial branch is not the appropriate forum to determine whether the crime charged is a "political offense" under the Treaty but that such a determination should properly be made by the executive branch. Specifically, the Government submits that: (1) the language of 18 U.S.C. §3184* restricts the scope of the inquiry made by a judge or magistrate to a hearing on "evidence of criminality;" (2) the language of the Treaty which requires that the "political offense" exception be determined by the "requested Party" refers to the executive branch of the Government and not to the judicial branch; and (3) that the "political question" doctrine enunciated in Baker v. Carr, 369 U.S. 186 (1962), mandates judicial deference to the executive branch on the political offense exception issue. We reject the Government's argument for the reasons set forth in the discussion below.

There is simply no precedent for adopting the Government's narrow reading of 18 U.S.C. §3184, limiting the courts' jurisdiction to a determination of "criminality" or probable cause only. Rather, all precedent is to the contrary. Throughout more than eighty years of jurisprudential history in every case in which the political offense exception has been squarely presented, whether raised under 18 U.S.C. §3184 or its similarly worded predecessor, Rev. St. U.S. §5270,* the courts have never declined to receive evidence on and consider the applicability of the political offense exception.** Furthermore, in *Abu Eain* v.

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*It should be recalled that sections 3181-95 of Title 18 of the United States Code establish the procedures to be utilized in extradition proceedings.

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*Rev. St. U.S. §5270 provided in relevant part:

> Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that *evidence of criminality* may be heard and considered. (emphasis added).

**It is interesting to note that in *In re Ezeta*, *supra*, 62 F. at 997, where the jurisdictional issue was raised, not by the United States Government, but by the government of the requesting country, the Court began its discussion of the political offense exception by simply stating, "[h]aving jurisdiction to determine whether the charges against the accused are of a political character or not, I proceed to the consideration of that question."

We note that we do not dispute the Government's position or the authority cited in so far as it supports the limited nature of the hearing on the probable cause determination. See discussion, *supra*, at 5-7. However, the cases cited by the Government in the "Government's Reply Brief," *Bryant* v. *United States*, 167 U.S. 104 (1897) and *Charlton* v. *Kelly*, 229 U.S. 447 (1913) did not address the scope of the hearing as it bears on the political offense exception.

Wilkes, the only case in which the Government raised the jurisdictional argument (1648), the Seventh Circuit wholly rejected the argument, which, in fact, was based on substantially the same reasoning posited here.*

Moreover, assuming arguendo, that Congress initially intended the narrow reading of the statute suggested by the Government, it is well settled that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ." Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) (and citations therein). Title 18 U.S.C. §3184 has existed in its present form save minor changes in phraseology since it was initially codified as Rev. Stat. §5270 by the First Session of the Forty-third Congress in 1873-74. Thereafter, R.S. §5270 was re-codified as 18 U.S.C. §651, and amended and re-enacted as 18 U.S.C. §3184 in 1948 and 1968. Thus, in the absence of any major statutory amendment and in the absence of any legislative history** which would preclude the judiciary from determining the applicability of the political offense exception, this Court may infer that Congress intended to incorporate the judicial interpretation of 18 U.S.C. §3184 into the plain words of the statute.

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*We note, without passing on the merits of such statutory construction, that the Court in Abu Eain v. Wilkes seemed to endorse a reading of that portion of 18 U.S.C. §3184, which requires a hearing to determine whether there is evidence "to sustain the charge under the provisions of the proper treaty," (emphasis added in Abu Eain v. Wilkes), to mean that a clause excepting political offenses is a "provision" of the treaty and thus, that a determination made under such a clause is within the scope of the hearing contemplated by the statute. Supra, 641 F.2d at 513.

**The Assistant United States Attorney stated at oral argument, held on June 18, 1981 at 41, that his research yielded no legislative history on the question of whether the judiciary was empowered to determine the applicability of the political offense exception pursuant to 18 U.S.C. §3184.

Thus, we adhere to the consistent precedent, whereby the judiciary has always determined whether the alleged offense falls within the ambit of the "political offense" exception, presumably relying on 18 U.S.C. §3184. Likewise, we adhere to the settled rule memorialized in In re Lincoln, 228 F.70, 73-74 (E.D.N.Y. 1915), aff'd per curiam, 241 U.S. 651 (1916) whereby the Secretary of State has sole discretion to determine whether the criminal charge is a subterfuge for political action, i.e., whether the request "has been made with a view to try to punish . . . [the extraditee] for an offense of a political character," (Treaty, Art. V(1)(c)(ii)), and sole discretion to consider due process safeguards and the political climate in the demanding country in determining whether extradition should be denied. See, Sindona v. Grant, supra, 619 F.2d, at 173-75; Note, "Executive Discretion in Extradition," 62 Colum L. Rev. 1313, 1323 (1962).

We address next the Government's argument that the term "requested Party" as used in Article V of the Treaty refers to the executive branch of the government and not the judicial branch. The contracting parties to the Treaty, which was re-negotiated and entered into force January 1, 1977, are charged with the knowledge of the way in which the Treaty has been interpreted. Absent an indication to the contrary, this Court has no basis upon which to assume that the parties intended to change a practice of more than eighty years.* Indeed, the "Minutes of Extradition Negotiations United States/United Kingdom," London, October 30, 1969 and December 1-4, 1969, which were supplied by the Government at our request, do not indicate any dissatisfaction with the way in which the earlier treaty was interpreted or any intention to preclude the American judiciary from determining the applicability of the political offense exception. Moreover, the interpretation and jurisdictional approach of Article V of the Treaty by our Courts, which we adopt, is entirely consistent with British jurisprudence and, as shown above, has been modeled on the British application of the political offense exception.

Finally, we are not persuaded that the Government's reliance on the "political question"-absention doctrine is proper.

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*The Government submits that the Treaty distinguishes between the functions of the judicial and executive branches by referring to "judge," "magistrate," and "courts" or a "competent authority" to indicate the former and using the term "requested Party" to refer to the latter. In support of this argument, the Government directs our attention to specific articles of the Treaty. A review of those provisions shows that the terms "judge," "magistrate," etc. have been used in the Treaty to refer to an authority of the requesting Party, the United Kingdom, and not the requested Party, the United States. We are thus totally unpersuaded by the Government's attempt to distinguish the roles of the judicial and executive branches of the United States based on this linguistic analysis.

The Government suggests that determinations of the applicability of the political offense exception clause is within the realm of international affairs decisions that are generally deferred to the executive branch, requiring "an initial polity determination of a kind clearly for nonjudicial discretion. . . ." Baker v. Carr, supra, 369 U.S. at 217. We disagree, since a determination made under that clause of the Treaty relates only to past political fact, whether a political revolt existed at the time and site of the alleged crime, and not the present political climate in the requesting country. Thus, in rejecting the applicability of the political question doctrine, the Court in Abu Eain v. Wilkes stated: "[t]he existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not." Supra, 641 F.2d at 514. (footnote omitted).

Furthermore, although the Government stresses that only the executive branch has the available sources to provide complete, accurate and up-to-date information on the political situation in a foreign country, the State Department is, of course, free to share that information with the court in the course of extradition proceedings. Indeed, in this case, Mr. Perez, Deputy Director for the Office of Combatting Terrorism, Department of State, (1338), testified on behalf of the Government. And, in a case where particularly sensitive evidence is involved in camera review is an available alternative.

The Government also suggests that a determination of the applicability of the political offense exception made by the judiciary might embarrass the executive branch and this country's foreign policy decisions. However, in rendering such determinations the Courts are not being called upon to make delicate foreign policy decisions, to debate the political climate in a certain country, or to pass judgment on the merits or demerits of the political affairs of another nation. Resolving the political offense issue requires only a determination of an isolated issue, *i.e.*, whether "there occurred violent acts and political tensions that resulted in the charged criminal acts." *Abu Eain* v. *Wilkes*, *supra*, 641 F.2d at 515. In fact, while we do not necessarily endorse this view, a commentary has noted, quite to the contrary of the Government's position, that:

> [j]udicial determination of extradition issues permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations.

Lubet and Czackes, *supra*, at 200.

In sum, this Court recognizes that the Government's arguments are imaginative and cannot be dismissed summarily. We also recognize that modern international political affairs are becoming increasingly complex and correspondingly, that the number of "hard" cases in which the "political offense" exception may be raised is likely to increase. Nevertheless, we adhere to to the long standing precedent which permits judicial determination of the political offense exception and defer any additional consideration and clarification which may be warranted to Congress and the treaty drafters.

B. Burden of Proof

In order to place in context our discussion of the facts which are relevant to determining the applicability of the "political offense" exception under the American "incidence" test, we must first resolve issues relating to allocation of burdens of production, standards of proof and decide which party should bear the ultimate burden of proof when the "political offense" exception has been raised. The decisional law provides little guidance as few cases have squarely addressed these questions and those that have reached wholly inconsistent answers. Turning thus to general, well accepted doctrine, we recognize that allocations of burdens of production, burdens of proof and standards of proof in American jurisprudence have consistently been used to achieve policy goals with a view toward elementary fairness and furthering the purpose of the underlying substantive law. McCormick's Handbook on the Law of Evidence, at 785-89 (2d. ed. 1972). With this in mind we must follow those rules which are appropriate in terms of the rationale underlying the political offense exception and the law of extradition. Indeed, a commentary has aptly stated:

> [t]he burden of establishing the political offense exception . . . may be seen as a question of policy rather than one of constitutional rights or fundamental fairness. It is necessary to balance the competing considerations of international comity, enforcement of treaty provisions, and protection of political dissent, within a procedural framework that allows the defendant a fair opportunity to raise the defense without unduly burdening the requesting state.

Lubet and Czackes, _supra_, at 208.

The respondent, Mackin, urges that this Court adopt the liberal view of relative burdens and standards of production which was enunciated in the Court's conclusion in _Ramos_ v. _Diaz_.

> [W]hen evidence offered before the Court _tends to show_ that the offenses charged against the _accused_ are of a political character, the burden rests upon the demanding country to prove the contrary. (emphasis added).

Supra, 179 F. Supp. at 463, footnoting, Hyde's International Law Chiefly as Interpreted and Applied by the United States, Second Revision, Vol. II, page 1025.*

On the other hand, the Government, relying in part on the Magistrate's decision in _Abu Eain_ v. _Wilkes_, Magis. No. 79

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*It should be noted that in _Ramos_ v. _Diaz_ the requesting country presented no evidence to _rebut_ the political offense defense.

M 175 (N.D. Ill., December 18, 1979) and in part in *In re McMullen*, *supra*, at 6,* submits that the extraditee has the burden to establish a *prima facie* case with respect to each element of the political offense exception and that ultimately, the extraditee must prove by a preponderance of evidence that the crime for which extradition is sought is of a "political character." For the reasons set forth below we adopt the Government's position.**

While the standard set forth in *Ramos* v. *Diaz*, *supra*, 179 F. Supp. at 463 is clearly the most advantageous to the respondent, concommitantly, it places an undue burden on the requesting country because it requires the requesting country to disprove all possible political connections without first requiring the defendant to establish a *prima facie* case with respect to the parameters of his claim. *See*, Lubet and Czackes, *supra*, at 208. Moreover, as the Government argued, under the *Ramos* v. *Diaz* scheme, the introduction of even the most minimal evidence by the respondent would result in a shifting of the

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*We note that neither of these decisions is particularly illuminating in its discussion of relative burdens or standards of proof. First, it is not at all clear that the Magistrate in *Abu Eain* v. *Wilkes* rejected the "tends to show" standard enunciated in *Ramos* v. *Diaz*, *supra*, 179 F. Supp. at 463. The Magistrate merely stated that the defendant was required to show the link between the alleged crimes and their political objective. The decision in *In re McMullen* is even more obscure. In that case, after finding that the respondent had met each element of the political offense exception, the Magistrate cited *Ramos* v. *Diaz* in support of the conclusion that the government had failed to meet its burden, *i.e.*, to present evidence that would contradict the applicability of the political offense exception. To add to the confusion, the Magistrate further concluded that the defendant had established by "preponderating" evidence that the crime charged was of a political character. *Supra*, at 6.

**This is also the view endorsed by commentators Lubet and Czackes, *supra*, at 209.

of the burden. In contrast, the standard proposed by the Government places a greater burden on the defendant, but only to the extent that he is required to establish the specific elements of the political offense exception. Thus, the requesting country has ample notice to refute the defendant's claim and would not be required to negate all possible political connections to the crime charged.

Furthermore, since the political offense exception is an affirmative defense, a collateral fact which, if successfully raised, will defeat a claim for extradition,* the party asserting the claim should bear the ultimate burden of proving by a preponderance of the evidence that the crime with which he has been charged is of a political character. It should be noted that this standard is entirely consistent with the allocation of burdens of proof on the issue of inducement when a defendant asserts the defense of entrapment to a criminal charge. See, Model Penal Code §2.13(2); U.S. v. Braver, 450 F.2d 799 (2d Cir. 1971). Moreover, it has been correctly recognized that:

> [t]his conclusion will accomplish basic policy of international cooperation in extradition without seriously compromising political

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*In Karadzole v. Artukovic, in vacating the writ of habeas corpus and remanding the case for hearing, 355 U.S. 393 (1958)(per curiam) the Supreme Court implicitly rejected the view that the "political offense" exception was a jurisdictional defense. When viewed as a jurisdictional defense, it is deemed to deprive the court of jurisdiction, i.e., the nexus between the crime charged and the political atmosphere render the offense nonextraditable. The requesting country would then be in the untenable position of having to include sufficient information in the extradition documents to remove the charged offenses from the political arena. See, Lubet and Czackes, supra, at 206-07.

> dissent. The placement of the burden of proof will not affect persons charged with either purely political offenses or with offenses involving speech and assembly. Those who have been charged with common crimes will be required to establish a political nexus, but proof of such a connection is uniquely under the control of the defendant.

Lubet and Czackes, supra, at 209.

III. THE APPLICATION OF THE POLITICAL OFFENSE EXCEPTION IN THE FACTUAL CONTEXT OF THIS EXTRADITION REQUEST

Having traced the development of the political offense exception to extradition requests in England and the United States and having resolved the preliminary issues of jurisdiction and burden of proof, we now turn to a recitation of the facts relevant to the inquiry that a court must conduct in determining the applicability of the political offense exception. Our analysis of the facts in terms of the substantive legal requirements of the exception, has led us to conclude that respondent Mackin has satisfied his burden of proof on each of the elements, thus barring his extradition. To this end we have distilled from the case law the following factors and will structure our analysis and conclusions accordingly: (1) whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense; (2) whether Mackin was a member of the uprising group; and (3) whether the offense was "incidental to" and "in furtherance of" the political uprising.

Briefly stating the parties' positions, Mackin contends that: (1) there was a political revolt in Northern Ireland, specifically, Andersonstown, Belfast, in March 1978 which was part of a continuous, albeit uneven, pattern of violent upsurgence by the Irish Republican Army (the "IRA") and its ideological successor, the Provisional Irish Republican Army (the "PIRA"); (2) he was a member of the PIRA; and that (3) proceeding under either the offense as charged in the extradition papers or respondent's version of the incident, the offense was "incidental to" and "in furtherance of" the political uprising.* In contrast, the Government submits that: (1) there was no war, rebellion, revolution or "serious political disturbance . . . in any period remotely contemporaneous with the March 16th incident in Andersontown" (sic) (Government's Brief, at 75); and that (2) Mackin's affirmative denial of the commission of the offense charged in the extradition papers precludes his successful assertion of the defense and bars a finding that the crime was "incidental to" or "in furtherance of" any political uprising.**

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*In support of respondent's position testimony was adduced from Mackin and the following expert witnesses: (1) Edward J. Holland ("Holland"), a writer and reporter who was born in Belfast (Holland, 370); (2) Richard J. Harvey ("Harvey"), a barrister admitted to practice in England and Wales (Harvey, 568-69); and (3) Rona M. Fields ("Fields") a psychologist (Fields, 893). All references to the transcript will be preceded by the name of the witness.

**The Government also seems to suggest that Mackin's avowed membership in the Provisional Irish Republican Army is disingenuous. (Government's Brief at 18, n.)

In support of the Government's position testimony was adduced from the following witnesses: (1) Brian Garrett ("Garrett"), a solicitor in Northern Ireland and life-long resident of Belfast,

Footnote continued on p. 49

A. The Political Crisis

(1) The Historical Conflict

In order to properly assess the political facts relevant to March 16, 1978-Andersonstown, Belfast, the time and site of the alleged crime, it is necessary to comprehend, in general terms, the political and historical heritage of Northern Ireland as well as the conflict of it more recent past. Violent rebellion to British domination has waxed and waned throughout the history of Ireland prior to its partition and in Northern Ireland since its creation in 1921 with particular continuity from 1969 onwards. Naturally, the "hard" facts are not contested, but the Government does contest the characterization of the political conflict in Andersonstown as qualifying for the application of the political offense exception.

Since 1921 the island popularly known as Ireland has contained two separate states: the southern portion, presently the Republic of Ireland (its predecessor was the Free State of Ireland), consisting of twenty-six counties, and the northern portion, Northern Ireland, part of the United Kingdom and presently under direct rule from the Westminster Parliament, consisting of six counties.

Footnote continued from p. 48

Northern Ireland, (Garrett, 966); (2) Kenneth Masterson ("Masterson"), a barrister admitted to the bar of Northern Ireland and currently Superintendent of the Royal Ulster Constabulary ("RUC"), the civil police force for Northern Ireland, in Andersonstown, (Masterson, 1227-28, 1230); (3) Frank H. Perez, see, supra, at 41 ; and (4) Vincent A. Lynagh ("Lynagh"), legal advisor to the Chief Constable of the RUC and a solicitor of the Supreme Court of Northern Ireland. (Lynagh, 1573-74).

Prior to its partition, all of Ireland was part of the United Kingdom and subject to British rule. Since the 17th century the period of British rule was marked by violent uprisings and rebellions by the Irish in opposition to British domination, followed by British military repression, significantly so in the years 1798, 1803, 1867 and 1916. (Holland, 383-87; Masterson, 1289-90). The objective of all of these rebellions was the establishment of a democratic republic of thirty-two counties, free and independent from British rule. (Holland, 384-85). However, the so-called "Rebellion of 1916," subsequent guerilla warfare in 1919 and the so-called "War of Independence" or "Black and Tan War" in 1921 resulted in only a partial realization of the goal for independence, i.e., in accordance with the Treaty of 1921, the partition of Ireland and the creation of the two separate states only one of which was independent. (Holland, 392-93, Masterson, 1290). It is noteworthy that at some point during the period from 1916-1921, a new political group emerged, called Sinn Fein,* which enjoyed popular support for its goal for an independent, democratic Irish state. Indeed, in the general annual election held in 1913, encompassing the entire population of Ireland and the United Kingdom, in which Sinn Fein stood for the goal of a united, independent Irish State, Sinn Fein won a majority of seats in Ireland and thereafter established an independent government and parliament. (Holland, 389-91; Garrett, 1021). However, the British government refused to recognize and legitimize the Sinn Fein government, and instead proscribed its existence and put its Members of Parliament in jail. Nevertheless, the Sinn Fein parliament continued to function as a government, and it recognized the IRA as its military wing. (Holland, 391-92; Masterson, 1291). From the time of its formation until 1969 the IRA consistently advocated the overthrow of British rule by violent means and the establishment of an independent unified Irish state.* (Garrett, 1009-10; Masterson, 1291-92; Holland, 392, 399-400, 422-23). See, discussion, infra, at 58-59, regarding the schism of in 1969 and the development of the PIRA, which followed the violent tradition of the original IRA.

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*In rough translation from Gaelic, Sinn Fein means "ours alone." (Holland, 388).

In order to understand the political crisis that has plagued Northern Ireland since its existence through the present decade we must explore briefly the nature of the partition of the island and certain consequences which flowed therefrom. As noted above, the partition was established and Northern Ireland was created by an act of the British Parliament, known as The Government of Ireland Act of 1920, which was accepted by the Sinn Fein government and a certain portion of the IRA* as an element of the settlement negotiated with the British Government to end the 1921 "War for Independence" and to prevent a widespread civil war. (Holland, 393, 395; Garrett, 1003-04). The partition of Ireland did not conform to any known geographical or political unit,** but instead was based on the sectarian and political division between the Catholic community, which was mainly concentrated in the southern portion of the Island, and the Protestant community, whose concentration was greatest in the northern sector. However, the partition did not create a homogeneous Protestant community in the north. At the time of its creation and to date about two-thirds of the population in Northern Ireland are Protestant, who have remained politically loyal to England, wishing to maintain a link with the United Kingdom and accordingly are known as Loyalists or Unionists. The remaining one-third are Catholic, who have tended to remain true to the long-standing tradition in support of political independence from Great Britain and the establishment of a unified Irish state. Those espousing those views are known as Nationalists or Republicans. (Holland, 397-98; Garrett, 976, 981-88, 1002-05). As Mr. Garrett, who testified on behalf of the Government, aptly summarized:

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*This is with the exception of that faction of the original IRA that supported the Treaty of 1921 which established the two separate states. The faction of the IRA, which did not form the Army of the Free State of Ireland, became an illegal organization led by Eamon de Valera in the early years. They viewed acceptance of the Treaty as a betrayal of their goals for a unified, thirty-two county Irish nation. (Holland, 399-401).

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*See footnote, supra at 51.

**Indeed, Ulster which was one of Ireland's four provinces at the time, was itself partitioned. (Holland, 394).

> [t]here has been a lengthy disorder between the two communities, essentially centering around what they wish to see as the national situation, or the national condition of Northern Ireland, leaving out the Republic of Ireland since 1920, and politics have been based on that.

(Garrett, 976; see also, Masterson, at 1297).

Northern Ireland was initially governed by a separate government and parliament administered from Stormont (Holland, 401-02; Masterson, 1290-91); in addition, the electorate of Northern Ireland sent twelve members to the Parliament of the United Kingdom. (Resp. Ex. S, ¶ 14). In 1972 the United Kingdom resumed "direct rule" of Northern Ireland, abolishing the Stormont Parliament which was unable to control the political situation. See, infra, at 62.

Moreover, the composition of Northern Ireland, with the Protestant sector holding a two-thirds majority and the Catholic electoral power correspondingly diminished, engendered and continues to engender great frustration among the Catholic community in regard to their socio-economic status, exacerbating the disparity in the quality of life between the groups and their long-standing animosities. (Garrett, 1002, 1007; Resp. Ex. S, ¶¶ 15, 19). During the reign of Stormont the Catholic minority were the object of various discriminatory practices including discrimination in housing and employment. Accordingly, despite the fact that the two communities in Northern Ireland share a common heritage, Northern Ireland has often been described as a place of two communities, particularly with respect to schooling, religion, employment opportunities and patterns, and cultural background. (Holland, 402, 416-17; Garrett, 976, 979-80, 1001-02; Resp. Ex. S, ¶ 15). In short, as the Government's witness, Garrett, stated:

> politics in northern Ireland, certainly, and to some extent outside northern Ireland and in the rest of Ireland, but essentially in northern Ireland, has been based on religion, not on the doctrine of religion, but on who you are and what you were born.

(Garrett, 975-76). Thus, since the partition of Ireland and the creation of the State of Northern Ireland in 1921, the animosity which developed between the Catholic and Protestant communities was grounded on social, economic and political differences. (Garrett, 1002; Resp. Ex. S, ¶ 15).

Furthermore, in every decade since the establishment of the Northern Irish state, the IRA and its ideological successor, the PIRA* has engaged in sporadic armed violence in opposition to British domination, in support of an independent, unified Irish nation, and, during the last fifteen years, in response to the Unionist Government's discrimination against the Catholic minority. (Holland, 399, 402-03; Garrett, 1010). Thus, the IRA continued to espouse ideological commitment to the tradition of violent opposition to British rule in Ireland, which had its inception in about 1918 or 1919. (Holland, 405, Masterson, 1292). Indeed, the IRA launched a violent border campaign from 1956 to 1962, focusing on targets which they identified with the Unionist regime. (Holland, 405; Garrett, 997; Masterson, 1296). In response, both the Stormont Parliament and the Dublin government in the Republic introduced internment without trial, arresting people who were identified as members of the IRA. (Holland, 405-06). It should also be noted that since the 1920's, the Government of Northern Ireland has had various paramilitary and military forces, including the police and paramilitary wings of the police in addition to the presence of several underground organizations to aid in the containment of IRA violence. (Holland, 400).**

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*See discussion, _infra_, at 58-59.

**These included an organization known as the "B Specials," which was a Protestant paramilitary organization, legitimized by an act of parliament, as an adjunct to the RUC to aid in containing IRA violence. The B Specials were abolished in 1969 after inquiries made by the British Government documented the fact that the B Specials were responsible for throwing bombs into Catholic homes and burning Catholic homes when they were mobilized to quell the 1969 Belfast riots. (Holland, 411-13; Garrett, 997).

In conjunction with the military activities of the IRA, Sinn Fein emerged as the political wing of the Nationalist movement. (Holland, 399). In addition to the violent resistance practiced by the IRA, the Catholic community manifested their discontent and objection to the existence of the State of Northern Ireland in a more passive fashion, e.g., Catholics who were elected to the Stormont Parliament refused to take their seats, denying recognition of the Stormont Parliament as a legitimate government and Catholics held mass civil rights protests, strategically modeled on the black movement in the United States in the late 1960's in Belfast and Londonderry (popularly referred to as Derry). (Holland, 403, 414; Garrett, 972-75; Masterson, 1302-03; Resp. Ex. S, ¶¶ 20-23).

(2) The Years 1969 to Date

Mackin contends that there was a political conflict in Northern Ireland, Andersonstown, Belfast in March 1978 which was part of a continuous political uprising, occurring during the prior decade, and having its roots in the tradition of sporadic violent rebellion discussed above; and that the political conflict was of sufficient magnitude to allow this Court to conclude that there was a war, rebellion, revolution or political uprising within the meaning of the political offense doctrine. To this end, the testimony adduced at the hearing in the presentation of respondent's political offense defense and in rebuttal by the Government, focused on the specifics relevant to the political situation from 1969 to the present day* with particular emphasis on the first quarter of 1978. In response to Mackin's assertion, the Government submits that the evidence is insufficient to allow us to conclude that there was a war, rebellion, revolution or political uprising in Northern Ireland in 1978 since: (1) the incidence of violence during 1978 was lower than in the preceding years, notably 1972; and since (2) the revolutionary force, the PIRA, has little community support and does not engage in systematic, organized warfare, but is a dispersed, terrorist organization.

Based on our consideration of the evidence offered at the hearing, and our analysis of that evidence in terms of the political offense exception which follows, this Court rejects the Government's argument and concludes that there was a political conflict in Andersonstown, Belfast, Northern Ireland in March 1978, which was part of an ongoing political uprising, albeit fluctuating in intensity, but nevertheless of sufficient severity to sustain Mackin's burden of proof on the first prong of the political offense exception.

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*Any reference in this opinion to the current situation in Northern Ireland has been included for the sake of providing a complete and accurate recital of the evidence presented to us, and is in no way meant to imply any judgment by this Court regarding the current political affairs in Northern Ireland nor does our decision in any fashion rely on any post-1978 facts.

Nineteen hundred and sixty-nine marked the escalation of the passive-resistance, strategy of the civil rights movement into "very serious inter-community rioting and violence in Belfast," (Garrett, 973),* and in Derry, as the Protestant sector responded to the street protests of the Catholic minority by engaging in counter-demonstrations, thus sparking confrontation and violence between the groups. (Holland, 415). Indeed,

> [t]he riots in August 1969 greatly exceeded in severity any that had occurred in the previous years. Casualties and damage to property were extensive. In Belfast, for instance, a large number of houses and licensed premises, mostly Catholic owned or occupied, were burnt down, destroyed or damaged.

(Resp. Ex. S, ¶ 25). And in Derry, the Catholic sector barricaded themselves into their community area, waging combat against the RUC and soldiers using rocks, bottles and stones. (Garrett, 1015-16). Thus, on August 14, 1969, the Westminster Parliament sent the British Army into Northern Ireland to "keep the two communities apart" (Garrett, 1025), and to supplement the RUC, the approximately 2,000-man British Army garrison and the 6,000-man "B Specials," in containing the violence.** (Holland, 415, 417-19; Garrett, 996-97; 1010-11, 1040).

Towards the end of 1969 and in early 1970, in the wake of the communal riots, the IRA split into two wings: the official

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*The Government's witness, Masterson, described the conflict in 1969 similarly, as "communal violence" and "intersectarian violence" between the two communities. (Masterson, 1302).

**The testimony seems to indicate that the RUC and "B Specials" actually provoked more violence than they contained. (Holland, 411-13, 415; Masterson, 1305; Resp. Ex. S, ¶ 23).

IRA, which sought to continue a course of political dissent and protest; and the Provisional Irish Republican Army, which sought to pursue the traditional strategy of the IRA, to engage in "armed conflict with the forces of the state," (Garrett, 1018), to bring about their aim of an independent, unified Irish state.* (Holland, 422-23; Garrett, 1020; Masterson, 1234, 1310; Resp. Ex. S, ¶ 28).

By 1971 the incidence of violence had dramatically increased in Northern Ireland, as the terrorist campaign of the PIRA intensified in Belfast and Derry, and at a later stage in the Republic of Ireland, triggering some terrorist activity on the part of the Loyalists. (Masterson, 1310-12; Resp. Ex. S, ¶¶ 29-30; see also, Resp. Ex. U). In an effort to contain the violence of the PIRA, which had reached "unprecedented proportions by the middle of 1971," (Resp. Ex. S, ¶ 36), on

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*We note at this point for purposes of clarification of some portions of the following discussion that the "Republican Movement" is used to refer both to involvement in the political wing, Sinn Fein, and the military wing, the PIRA. They are distinguishable to the extent that a member of the Sinn Fein may not necessarily be a member of the PIRA. (Holland, 428-29).

August 9, 1971 the Stormont Parliament introduced internment without trial.* Beginning at 4:00 a.m. the British Army acting in conjunction with the RUC, arrested 350 persons* suspected of involvement in the PIRA and took them to one of the three regional holding centers for purposes of interrogation. There is no question that the focal point of the operation was the Catholic community, and that it was not aimed at selected individuals but as a "sweeping-up" exercise directed at the entire PIRA. (Resp. Ex. S, ¶¶ 38-39; Masterson, 1312-13; Holland, 424-25). During the period of internment, which spanned from 1971-1975, approximately 1,100 to 1,200 persons or 30-40 percent of the population of Andersonstown were interned at any one given time. (Masterson, 1314, 1316-17).

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*In its Judgment in the Case of Ireland v. The United Kingdom, the European Court of Human Rights mentions some additional reasons, cited by the United Kingdom, for the internment procedures.

> Firstly, the authorities took the view that the normal procedures of investigation and criminal prosecution had become inadequate to deal with IRA terrorists; it was considered that the ordinary criminal courts could no longer be relied on as the sole process of law for restoring peace and order. The second reason given, which was closely related to the first, was the widespread intimidation of the population. Such intimidation often made it impossible to obtain sufficient evidence to secure a criminal conviction against a known IRA terrorist in the absence of an admissible confession or of police or army testimony. Furthermore, the conduct of police enquiries was seriously hampered by the grip the IRA had on certain so-called "no-go" areas, that is Catholic strongholds where terrorists, unlike the police, could operate in comparative safety. Thirdly, the ease of escape across the territorial border between Northern Ireland and the Republic of Ireland presented difficulties of control.
>
> In addition to the three "security" reasons, there was, in the judgment of both the Northern Ireland Government and the United Kingdom Government, no hope of winning over the terrorists by political means, the reform programme initiated in 1969 having failed to prevent continuing violence.
>
> The authorities therefore came to the conclusion that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activities but against whom sufficient evidence could not be laid in court. This policy was regarded as a temporary measure primarily aimed at breaking the influence of the IRA. It was intended that a respite would be provided so as to enable the political and social reforms already undertaken to achieve their full effects.

(Resp. Ex. S, ¶ 36).

Post-internment, in 1972, the scale of violence upsurged markedly, unquestionably signifying the peak period of shootings, bombings, and fatalities for the 1969-1979 decade. According to the official statistics compiled by the RUC, in 1972, there were 10,628 shootings, 1,853 bombings (including devices defused), and 467 fatalities, 146 non-civilians (including 103 British soldiers) and 321 civilians (including suspected terrorists). (Holland, 425; Resp. Ex. U). Furthermore, there is no dispute that the PIRA was identified as responsible for a great number of the violent incidents. In response, to supplement the 3,500-man RUC, in controlling the violence, the size of the standing British Army in Northern Ireland was increased to approximately 21,000-24,000 men during the years 1972-1974 and the Ulster Defence Regiment was created as an official regiment of the British Army, consisting of approximately 6,500-7,500 men. Indeed, the British Army maintained two bases, known as Silver City and Fort Monagh,* in Andersonstown as temporary housing facilities for its soldiers, in addition to a third facility west of Andersonstown, the Woodbourne Army Base. (Masterson, 1276-77, 1324-28, 1331; Garrett, 998). In sum, as Government witness Masterson observed ". . . it has to be appreciated that it requires a large number of personnel, unfortunately, to keep the two sides apart in Northern Ireland. For that reason it is necessary to employ substantial numbers." (Masterson, 1327). The deterioration of the political fabric of Northern Ireland during the post-internment period of "very serious street violence," (Masterson, 1278), was also evidenced by the creation of so-called "no-go areas," _i.e._, barricaded areas insulating the Catholic community, excluding the entry of the RUC and British Army. (Holland, 426-27; Masterson, 1277-78).

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*This statistic reflects the finding of the European Court of Human Rights in its Judgment in the Case of Ireland v. The United Kingdom. (Id. at ¶ 39).

Finally, in March 1972, in view of the rapidly declining ability of the Unionist Government to enforce "law and order" and the unparalleled high level of violence, the Stormont Parliament was abolished and the Westminster Parliament resumed direct rule of Northern Ireland. (Holland, 402, 430; Garrett, 1055-56; Resp. Ex. S, ¶ 49). Determined to end the escalating conflict and to avoid additional bloodshed, William Whitelaw (presently Home Secretary for the United Kingdom) met with representatives of the PIRA in England to negotiate a truce, which resulted, unfortunately, in only a temporary, two to three week cease-fire. (Holland, 430-32; Garrett, 1018-19).

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*Silver City and Fort Monagh were vacated in August of 1980. (Masterson, 1277).

Thus, the conflict, termed a "guerilla war" by the Government's witness, Garrett, continued through 1978 and to the present day. In clarifying his use of the term "guerilla war," Garrett further defined the political crisis as follows:

> [i]t is a situation in which a group of very determined people are prepared to use violence in bringing about what they see as the proper course for Northern Ireland, that is to say, that it should be part of their united 32-county Ireland.

(Garrett, 1102). The visible evidence of this quasi-military conflict is quite vivid. From the initial introduction of the British Army in 1969 through 1978, when there were approximately 13,000 British soldiers in Northern Ireland, and continuing to date, soldiers have patrolled the streets of Belfast, especially the Catholic areas, in full battle gear, armed with self-loading automatic rifles. (Holland, 467-68; Garrett, 999).* In addition, armed personnel carriers, armored cars, land rovers equipped with machine guns and helicopters equipped with search lights have been used for patrol purposes on a rather frequent basis. (Holland, 469-73; Garrett, 1011). Furthermore, although not quite as visible, personnel attached to the Special Services Regiment, the S.A.S., functioned as undercover agents in areas where there was suspicion of PIRA terrorist operations. (Holland, 454-61; Garrett, 1075). Indeed, as Government witness Garrett testified, there is an element of the Catholic community, albeit a small portion, that views the "British Army's role as that of an adversarial army. . . ." (Garrett, 1036). Moreover, it is absolutely clear that the PIRA perceives the British Army as an enemy force; the PIRA is committed to the traditional goal of Irish nationalism, the removal of British presence from Ireland and the unification of Ireland through the use of violent means, directed, to a large extent, against the security forces. (Holland, 487-92; Garrett, 984, 1017-18, 1073-74; Masterson, 1238-39, 1292). In fact, according to the British Army's own assessment, the PIRA consists of 500 "hard case" members, not "mindless hooligans," but experienced terrorists,

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*Approximately 420 of the 13,000 were stationed in the Andersonstown area. (Masterson, 1331).

> committed to a long-term campaign of attrition against the British in the North of Ireland, with the overall objective of a nationalist state, an independent Ireland; with the overall objective of driving the British Army out of Northern Ireland and of joining the Northern Ireland state to make a united Ireland with the South.

(Holland, 487, 489).

In addition to engaging in so-called "terrorist" activities, the PIRA and the Republican Movement have maintained patrols for the purpose of monitoring the activity of strangers in the Catholic areas, thus acting as a crude local police force, and the Sinn Fein wing has actually set up "incident centers" at which people can report minor crimes. (Holland, 479-80). A "people's taxi" service has also been implemented and operated by members of the Republican Movement as a shuttle service from the shopping areas in Belfast to the Catholic neighborhoods in the West Belfast area since transportation services had been withdrawn from those areas in response to the violence. (Mackin 798). The degeneration of the social fabric of Belfast society is further evidenced by the series of check-points established for entry into the downtown Belfast shopping areas and the civilian personnel search units which are required to search all persons and their baggage before entering the city center. (Masterson, 1430).

A review of the following official statistics compiled by the RUC, (Resp. Ex. U), shows a significant and steady decline in the level of violence from 1972 through 1978. Nevertheless, the political situation reflected in the 1978 statistics could hardly be termed "normal" as did the Government's witness Masterson. (Masterson, e.g., 1254-58; 1417-18; 1444-45).

TABLE 6: The Security Situation -- 1969-78

Reference	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978
Fatalities										
RUC	1	2	11	14	10	12	7	13	8	4
RUC 'R'	-	-	-	3	3	3	4	10	6	6
Army	-	-	43	103	58	28	14	14	15	14
UDR	-	-	5	26	8	7	6	15	14	7
Civilian[1]	12	23	115	321	171	166	216	245	69	50
TOTAL	13	25	174	467	250	216	247	297	112	81
Terrorists Incidents										
Shootings	-	213	1756	10628	5018	3206	1805	1908	1081	755
Bombs[2]	8	170	1515	1853	1520	1113	635	1192	535	633
Incendiaries	-	-	-	-	-	270	56	239	608	115
TOTAL	8	383	3271	12481	6538	4589	2496	3339	2224	1503
Finds										
Weapons	-	324	717	1264	1595	1260	825	837	590	400
Explosives (tons)	-	0.4	2.6	27.4	31.6	23.7	9.9	16.9	2.7	3.5
Terrorists Charges										
All offences	-	-	-	531	1414	1362	1197	1276	1308	843

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[1] Includes 'suspected terrorists.'

[2] Includes devices defused.

More specifically, during the first three months of 1978, there were 30 fatalities, 148 injuries, 235 shooting attacks and 90 bombings. (Masterson, 1248-49). In fact, witness Masterson admitted that the statistics taken at face value "convey an atmosphere of disruption throughout the community," but explained that large parts of Northern Ireland have been unaffected, since the terrorist violence has been largely concentrated in the Catholic area, namely, West Belfast, which includes the Andersonstown area. (Masterson, 1254-59). In addition, a review of the portion of the London Times Index which was produced indicates that during the months of February and March there was a high incidence of reported crime, including shootings and bombings involving the PIRA and the British Army. (Resp. Ex. E).

Indeed, in summarizing the Catholic community's response to British domination and the partition of Ireland, the Government's witness Masterson stated:

> I think Irish history indicates that two sort of parallel movements would have operated at any one time, one advocating sort of constitutional change and the other advocating overthrow of British rule by violence.

Masterson also agreed with the statement of Mackin's counsel that "the advocacy of violent overthrow has always been part and parcel of the IRA or a subdivision thereof." (Masterson, 1292; see also, Garrett, 976).

In addition to evidence of a military or quasi-military conflict, certain legislation and judicial procedures enacted by the Westminster Parliament, indicate the severity of the political commotion in Northern Ireland.* In this connection, Lord Diplock was appointed Chairman of the "Commission On Legal Procedures to Deal With Terrorist Activities in Northern Ireland." (Harvey, 615-17). The purpose of the Commission was to consider:

> what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations.

(Resp. Ex. M, ch. 1, ¶ 1). For the purposes of clarification of the scope of the reference, the "Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland," (the "Diplock Report"), defined "terrorist acts" as "the use or threat of violence to achieve political ends. . . ." (Id. at ch. 3, ¶ 3). The Diplock Report further stated that "[t]he object of the terrorist organisations which concern us is to bring about political change in Northern Ireland by violent means. . . ." (Id. at ch. 3, ¶ 5). Moreover, the Diplock Report specifically identified the IRA and PIRA as terrorist organizations with which it was concerned and in fact relied on information about the effects of "Republican terrorism" on the administration of criminal justice in developing its recommendations.* (Id. at ch. 3, ¶¶ 9-10).

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*We take care to mention that in discussing the legislation and judicial procedures enacted specifically to deal with terrorist activities, this Court in no way means to pass judgment on the judicial process respondent would face in the requested country. This judgment is clearly within the exclusive jurisdiction of the Department of State. Sindona v. Grant, supra, 619 F.2d at 176 (and citations therein).

As a result of the recommendations contained in the report,** the United Kingdom enacted the 1973 Emergency Provisions Act (the "Act"), (Harvey, 617-18), "to deal with what are loosely known as terrorist crimes but . . . not . . . defined as such. . . ." (Garrett, 1063).***

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*Indeed, the Diplock Report stated that:

> [t]errorist acts are not the monopoly of extremists on one side only of the dispute which has long divided Northern Ireland. . . . Hitherto, however, the majority of terrorist acts about which the facts are known to the security authorities have been committed on the Republican side and by members of the Provisional or the Official IRA.

(Resp. Ex. M, ch. 3, ¶ 9).

**It is important to note the context in which Lord Diplock intended his recommendations to apply. He stated:

> Although in one sense there has been an intermittent state of emergency in Northern Ireland since it first became a separate province we regard the emergency which led to our appointment as that which has resulted from the escalation of terrorist activities since 1969. Our recommendations are intended to deal with this situation and to continue in effect only so long as it persists.

(Id. at ch. 2, ¶ 6). The 1973 Emergency Provisions Act was consolidated with the Young Person Act 1974 and the Emergency Provisions Amendment Act 1975 and 1978 containing virtually all of the original provisions of the 1973 Act.

***Since the 1973 Act was in effect at the time of the commission of the crime charged in this matter, all references will be to that Act.

In essence, the Act sets forth a schedule of common law offenses which are processed and prosecuted by the authorities in a manner which differs from the normal criminal law procedures. With respect to some of the scheduled offenses, including two of those with which Mackin was charged, attempted murder and wounding with intent to cause grievous bodily harm, the Director of Public Prosecutions for Northern Ireland, acting on behalf of the Attorney General of Northern Ireland, has the option of treating the offense as either a scheduled or descheduled offense. (_See_, Resp. Ex. N, Schedule 4, Part I, section 1. & Notes 1 and 2, Part II, section 13(b); Harvey 621-24, 707-08; Masterson, 1510-11, Lynagh, 1599-1600). Thus, although there is no crime of "terrorism" the arrest of a "suspected terrorist" under Part II, section 10 ("section 10") of the Act, will channel the arrestee through the special procedures established by the Act rather than through the standard criminal law system.* (Harvey, 624; Lynagh, 1599-1600).

Most significantly, the differences between arrest and prosecution under the Act and under the normal criminal procedure laws are the following. First, an arrest made under

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*Mackin was arrested under section 10 of the Act. See discussion, _infra_, at 97.

Section 10 provides in pertinent part:

> (1) Any constable may arrest without warrant any person whom he suspects of being a terrorist.
>
> (2) For the purpose of arresting a person under this section a constable may enter and search any premises or other place where that person is or where the constable suspects him of being.

Footnote continued on p. 7)

section 10, allows the authorities to detain the arrestee without counsel* for purposes of questioning for seventy-two hours rather than the maximum forty-eight hour period, applicable in standard criminal procedure, after which the arrestee must be presented before a magistrate. And moreover, a defendant prosecuted under the Act would necessarily be subject to trial in the so-called "Diplock Courts," one-judge courts sitting without juries, rather than in the "Crown Courts" where the defendant would be entitled as of right to a jury trial.** (Holland, 446, 453; Harvey, 622-23; Lynagh, 1600). Furthermore, in conducting a trial in the Diplock

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Footnote continued from p. 70

> (3) A person arrested under this section shall not be detained in right of the arrest for more than seventy-two hours after his arrest, and section 132 of the Magistrates' Courts Act (Northern Ireland) 1964 and section 50(3) of the Children and Young Person Act (Northern Ireland) 1968 (requirement to bring arrested persons before a magistrates' court not later than forty-eight hours after his arrest) shall not apply to any such person.

*It should be noted that there is no formal right to counsel anywhere in the United Kingdom, thus making the period of detention very important. (Harvey, 656-57).

**It is interesting to note, that, in essence, the "Diplock Report" determined that jury trials were "not practicable in the case of terrorist crimes in Northern Ireland" due to the difficulty in obtaining a fair trial for Republican terrorists. (Resp. Ex. M, ch. 5, ¶ 36).

Courts, the judge has the discretion to apply one of two legal standards regarding the admissibility of statements or confessions made by the defendant; the common law standard set forth in the "Judges' Rules" (Gov't. Ex. 15), or the more liberal standard for the admission of confessions in section 6 of the Act.* (Masterson, 1547-48). However, no court has specifically determined whether the detailed guidelines for police interrogation procedures set forth in the "Judges' Rules" apply to interrogation and custody under the Emergency Provisions Act. (Masterson, 1550). It should also be noted that shortly after the introduction of internment through March of 1976, internees and prisoners arrested and convicted under the Act, who claimed a connection to one of the paramilitary organizations including the PIRA, or were convicted of a crime involving the PIRA or one of the other paramilitary groups, received "special category status" or "political status."* "Special category status" prisoners were housed in separate huts rather than cells, and were permitted to wear their own clothing, refuse to perform penal work, and to organize political groups among themselves. (Holland, 443-45; Mackin 781-82).

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*Except for a difference in structure and sub-paragraphing, Part I, section 6 the 1973 Emergency Provisions Act is identical in language to Section 8 of the 1978 Emergency Provisions Act, about which witness Masterson testified.

Section 6 provides:

> (1) In any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance to subsection (2) below.
>
> (2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subject to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement in question shall be inadmissible).

In recommending this standard, the "Diplock Report" concluded that:

> [i]t would not render inadmissible statements obtained as a result of building up a psychological atmosphere in which the initial desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner, or statements preceded by promises of favours or indications of the consequences which might follow if the person questioned persisted in refusing to answer.

(Resp. Ex. M, ch. 8, ¶ 90).

Further evidence of the severity of political insurrection in Northern Ireland lies in the fact that in 1957, 1969 and 1971, the United Kingdom filed derogations to the European Convention on Human Rights (the "Convention") pursuant to Article 15 of the Convention which permits a Contracting

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*The British Government abolished "political status" treatment for prisoners in March of 1976. Thus, anyone convicted of a crime after that date would automatically be treated as an "ordinary criminal." (Holland, 444).

Party to employ measures in derogation from its obligations under the Convention "in time of war or other public emergency threatening the life of the nation. . . ." (Resp. Ex. S, ¶ 203 (Article 15 of the Convention, ¶ 1); Harvey, 1143-45).* In its submission to the European Commission on Human Rights, in the Case of Ireland against The United Kingdom,** the United Kingdom cited, in the words of the Convention, the reason for its derogation as the existence of a "public emergency threatening the life of the nation" due to the activities of the IRA in pursuit of its aim to destroy the existence of Northern Ireland as part of the United Kingdom. (Harvey, 1147). Indeed, in its judgment, issued in January of 1978, the European Court stated:

> Article 15 comes into play only "in time of war or other public emergency threatening the life of the nation." The existence of such an emergency is perfectly clear from the facts summarised above . . . and was not questioned by anyone before either the Commission or the Court.

(Resp. Ex. S, ¶ 205).***

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*The derogation filed in 1971 is still in effect. (Harvey, 1145-46).

**In 1971, the Government of the Republic of Ireland filed a complaint against the United Kingdom with the European Commission of Rights, alleging violations of the European Convention on Human Rights in so far as members of the security forces inflicted ill-treatment at the initial arrest and subsequent interrogations of those arrested on August 9, 1971 under the United Kingdom's internment procedures.

***At an earlier point in its judgment, the European Court noted that based on the figures cited before the Commission by the United Kingdom, "over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 [pounds] worth of property destroyed. . . ." (Resp. Ex. S, ¶ 12).

In terms of the political situation in Northern Ireland in 1978, the Government denies the import of the Diplock Court system and the derogations filed by the United Kingdom from the Convention, asserting that they relate to the 1972 peak period of violence rather than to 1978. (Government's Reply Brief, at 17-18). The Government is factually correct in recognizing that the recommendations made in the "Diplock Report" which resulted in the enactment of the 1973 Emergency Provisions Act were in response to the 1972 period of terrorist activities. The derogations, however, have been in effect since 1957 and have been renewed consistently thereafter. Regardless of the initial reasons for the enactment of the emergency legislation and the filing of the derogations, the reality is that the United Kingdom has not seen fit to abandon either of these measures and indeed they are still in force.

The Government advances two counter arguments based on the statistical evidence reflecting the degree of military or quasi-military conflict: (1) there was a marked, steady decline in the incidence of violence from 1972 to 1978 and (2) the level of the political violence in 1978 in Northern Ireland was insufficient to fulfill the first element of the political offense exception, i.e., the existence of a severe political disturbance such as a war, rebellion or revolution.

There is no quarrel that the statistical evidence provided by the RUC shows a significant decline in the degree of violence from 1972 to 1978. However, a statistical comparison of the level of violence over the course of a decade is hardly dispositive of the political offense exception issue before this Court. We must still address the question of the level of conflict in 1978. Furthermore, in so far as we deem the political conflict in Northern Ireland in 1978 as part of an on-going, continuous uprising by the PIRA against British domination, with the goal of establishing a unified Irish nation, we view the statistics as one segment of the totality of evidence presented.*

The second thrust of the Government's argument requires a more detailed response. As the Government correctly points out the Second Circuit has not decided whether a political disturbance of a less violent character than a war, revolution or rebellion is sufficient to trigger the application of the "political offense" exception. Sindona v. Grant, supra, 619 F.2d at 173.** Similarly, other recent cases construing the political offense exception in contexts where it is at least arguably raised provide little guidance in this area. In *Abu Eain* v. *Wilkes*, the Court stated in *dicta* that: "[w]hen considering the political offense exception, a court need consider only whether some incidents of political violence have occurred, and not whether the violence has risen to a particular level." *Supra*, at 514 n. 14. However, the Seventh Circuit in *Abu Eain* issued no holding regarding whether there was a state of war, revolution or rebellion in Israel at the time of the commission of the offense charged in the extradition documents.* And in *In re McMullen*, *supra*, at 3-4, the Court apparently took judicial notice of the existence of an "insurrection and a disruptive uprising of a political nature" at the time McMullen committed the charged offenses. *See also*, *Ramos* v. *Diaz*, *supra*, 179 F. Supp. at 462 (where the Court took judicial notice of the political insurrection in Cuba between the Batista regime and Fidel Castro and his supporters).

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*See discussion infra, regarding the contemporaneity requirement of the "political offense" exception, at 95-96.

**It should be noted that in Sindona, the petitioner was seeking to invoke the "political offense" exception in the context of a charge of fraudulent bankruptcy and that the courts have consistently held that financial crimes are outside the scope of the "political offense" exception. See, footnote, supra, at 32.

Thus, in view of the sparsity of American judicial precedent, we look to the language in *In re Castioni* for guidance in determining the level of violence required to find that the political situation is sufficiently severe to satisfy the first element of the political offense exception: there must be " . . . a political matter, a political rising, or a dispute

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*Both counsel for Mr. Mackin and the Assistant United States Attorney agree that the decision in *Abu Eain* does not include a holding of the court on the first element of the "political offense" exception.

between two parties in the State, as to which is to have the government in its hands. . . ." Supra, 1 Q.B. at 156. In giving substance to this formulation, American courts have alternatively labeled the requirement for a severe political disturbance.*

Without belaboring the difference in the semantic variations that have been applied, we conclude that when viewed in the context of a continuous uprising spanning at least a decade, with historical antecedents, the level of violence in Andersonstown, Belfast, Northern Ireland in March 1978 was of sufficient severity and in the nature of the political uprising as contemplated by In re Castioni, and the subsequent American applications of the "political offense" doctrine, to satisfy the first element of the exception.

The Government also submits that this Court is precluded from finding that there was a severe political disturbance in Andersonstown, Belfast, Northern Ireland in 1978 since the PIRA is an unorganized, dispersed organization, rather than a structured army, engaged in terrorist activity with little community support. In this connection the Government cites Abu Eain v. Wilkes, supra, 641 F.2d at 519-20, in support of the proposition that a distinction ought to be drawn between those cases in which extradition has been barred based on a finding of "on-going, organized battles between contending armies, . . ." and cases in which the conflict involved dispersed organizations, such as the PLO, engaged in "destructive efforts at a defined civilian populace." (See, Government's Brief, at 75-79 and see 1698). We reject the Government's argument as unsupported for the following reasons.

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*For example, the Courts have used the following descriptives in defining the requirements of the first element of the political offense exception: war, revolution, rebellion, insurrection, and uprising. See discussion, supra, at 28.

In support of its factual argument regarding the nature of the PIRA, the Government seeks to compare the PIRA with other contemporary terrorist groups, namely the Basque terrorists in Spain and the "Red Brigade" in Italy. (See generally, Perez, 1346-57). In attempting to draw this parallel, testimony was adduced which focused on: (1) the structure of the PIRA as a clandestine, cellular organization, consisting of approximately 200 to 250 members, with little community support; and (2) the similarity of the tactics employed by the PIRA and other terrorist organizations with specific emphasis on civilian directed attacks, e.g., assassinations, knee-cappings, kidnappings, bombings and shooting attacks. (Perez, 1350-52, 1356; Masterson 1241-42). In addition, the Government's witness, Perez stated that similar to other terrorist groups, the basic objective of the PIRA is to "create a very unstable political situation in the country." (Perez, 1345, 1357).*

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*It is interesting to note that when Mr. Perez was asked for his definition of "terrorism" he stated:

> Well there is no really agreed definition of terrorism. There is the old cliche that one man's terrorist is another man's freedom fighter.

(Perez, 1357).

As we observed at oral argument, we cannot engage in a world-wide survey comparing the structure and tactics of one terrorist organization to another to determine whether, as a general proposition, the PIRA's activities should be excluded from the application of the political offense doctrine. (1698). In addition, the facts relied upon by the Government in making this argument are not undisputed by other facts in the record. Indeed, the PIRA has been characterized not as a group of "mindless hooligans" but as an organized group of 500 "hard core," experienced and high caliber members. (Holland, 489; Masterson, 1522). Quite contrary to the image of the PIRA as a "dispersed" group, its members have conducted so-called "Republican funerals" for fellow members who have been killed in Northern Ireland. At a "Republican funeral," PIRA members march in formation, wearing distinctive uniforms, and fire volleys of ammunition over the grave of the deceased. (Holland, 536-38; Masterson, 1416-19). Likewise, Government witness, Garrett agreed with the description of the Provisional Movement as "committed to the traditional aim of Irish nationalism, that is, the removal of the British presence from Ireland," (Garrett, 1073), by engaging in "armed conflict with the forces of the state." (Garrett, 1018). And while the entire Catholic community does not necessarily support the terrorist activities of the PIRA, nevertheless it does provide widespread passive support such as the harboring of a member of the PIRA who is being sought by the authorities. (Holland, 518-20).

Moreover, the Government's reliance on Abu Eain v. Wilkes, is somewhat misplaced. As noted above, the Court in Abu Eain never determined whether the "conflict" in Israel was of sufficient severity to satisfy the first element of the political offense exception, nor addressed how the dispersed composition of the PLO related to determining whether there was a severe political disturbance. Supra, 641 F.2d at 519. Rather, the Seventh Circuit held that the specific violence alleged, the indiscriminate bombing of a civilian populace, was an "anarchist-like activity, *i.e.*, the destruction of a political system by undermining the social foundation of the government," *id*. at 521, without substantial ties to political activity and thus not "incidental to" a political disturbance.*

One matter not specifically raised but suggested by the Government ought to be addressed at this point. (Government's Brief, at 77). The testimony of Government's witness Masterson is scattered with references to the fact that the violence has not been widespread but has been concentrated in the West Belfast area.

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*Similarly, if the specific violence alleged in the case before this Court was of an anarchistic nature, directed at the civilian population, we would not conclude that the act was "incidental to" and in "furtherance of" a severe political disturbance. See discussion, infra, at 98-99.

(See, e.g., Masterson, 1254-58).* First, it should be noted that Masterson's testimony is not controverted in so far as it designates the focal point of the violence. However, his assertion that large parts of Northern Ireland have been totally or relatively unaffected, including other parts of Belfast, seems somewhat arguable in light of the other testimony adduced at the hearing, which has been reviewed above. In any event, there is no requirement in the case law that there be a widespread, nationwide civil war in order to satisfy the first element of the "political offense" exception. In fact, In re Castioni involved a political uprising in one town in a canton in Switzerland, which Judge Denman described as a "small community." Supra, 1 Q.B. at 157. Thus, in so far as the evidence supports a finding of a severe political disturbance in the West Belfast area, where the alleged offense was committed, we need not determine the geographical scope of the disturbance nor alter our conclusion based on Masterson's testimony.

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*For example, Masterson stated:

> . . . it's possible in one day you can drive right across from Northern Ireland from north to south, east to west, and never see a member of the police or army or a terrorist. In a sense it's a very peaceful setting.
>
> So far as the Belfast area is concerned, again, reading the newspapers or listening to television, one would imagine that the entire city of Belfast was consumed by terrorist violence. In point of fact, right through the situation, the majority of a great amount of the terrorist violence has been concentrated in the west part of the city. And in the parts of North Belfast, Southeast Belfast, and the surrounding area on those compass points have been relatively unaffected by it. That's not to say that occasional attacks haven't taken place, but by and large, the people in those areas have again, even though they live in at most five to six miles where the main terrorist violence has occurred, would be unaware of what was going on.

(Masterson, 1255-56).

In light of the foregoing review of the evidence and having rejected the Government's arguments, the Court concludes that there was a political conflict in Andersonstown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising, fluctuating in intensity, but nevertheless of sufficient severity to satisfy the first prong of the political offense exception.

In order to avoid any possible confusion as to the standard this Court has employed in reaching this conclusion, we shall in summary fashion reiterate the evidence specifically relevant to March of 1978, which has formed the basis for our decision.

1. The statistics supplied by the RUC indicate generally a high level of violence in 1978, and that the violence was concentrated in the Catholic areas of West Belfast and Derry;

2. There were 13,000 British Army personnel in Northern Ireland in 1978, approximately 420 of which, according to the Government, were stationed in Andersonstown, to aid the already ample police force in containing the violence.

3. There were three British Army forts established for the housing of soldiers, Fort Monagh, Silver City, and the Woodbourne Army base, all of which were in the Andersonstown area;

4. The United Kingdom enacted emergency legislation, the 1973 Emergency Powers Act, in effect in March, 1978, which included the establishment of special non-jury courts known as "Diplock Courts," in order to adequately deal with the rise in terrorism in Northern Ireland.

5. The United Kingdom filed derogations from the European Convention on Human Rights to allow it to forego its obligations thereunder, citing as its reason the existence of a "public emergency threatening the life of the nation."

6. The PIRA, which has been identified as the uprising group in 1978 and the ideological successor of the IRA, has maintained a campaign of violence aimed at the British Army and Loyalist forces against British domination of Northern Ireland and in support of a unified, independent Irish nation.

B. Respondent Mackin's Participation In The "Uprising Group"

Having determined that there was a political insurrection in Northern Ireland, which has spanned a considerable period of time, up through and including March of 1978, and having identified the IRA and its ideological successor, the PIRA as the revolutionary force, we now consider the second element of the political offense exception, whether Mackin was a member of the "uprising group."*

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*Throughout this discussion in referring to the "uprising group," both the terms PIRA and Republican Movement will be used since the "Republican Movement" is made up of three branches including the PIRA (the other two branches are Sinn Fein, the political wing and "Na Fianna Eireann," the youth branch) and as such both terms have been used in the discussion above of the forces involved in the political uprising in Northern Ireland. (Mackin, 727; Holland, 428-29).

Based on the record before us, this Court concludes that Desmond Mackin has unquestionably sustained his burden of proof in establishing his long standing commitment to the Republican Movement and his membership in the PIRA on March 16, 1978, the date of the offense charged in the extradition papers.

Desmond Mackin was born on July 18, 1955 in West Belfast. (Mackin, 725). Mackin has a family heritage of activism in the Republican Movement (Mackin, 740), and not infrequently, as a child and young man, he was personally confronted with the violence and political unrest in his community. His grandfather, John Mackin, was a commander in the IRA in the 1920's in Fermanagh, one of the border counties in Northern Ireland. Mackin's grandmother was active in the Republican women's organizations as a young girl and through the 1940's; in approximately, 1942 she was arrested by the British after they seized "the newspaper of the Irish Republican Army in the back of her home." (Mackin, 740-41). And, in 1956, two of Mackin's uncles were arrested and imprisoned for IRA related activities during the 1956 border campaign. (Mackin, 741-42).

In 1963 Mackin and his family were driven out of their home in East Belfast, a largely Loyalist community, at gunpoint by a group of Loyalists. After this incident in search of a safer community, the Mackin family moved to the heart of West Belfast. (Mackin, 744). In 1969 Mackin and his family were again forced out of their home by a Loyalist group; this time, however, they were beaten and their house was one of the 500 burned by Loyalist mobs that night. (Mackin, 746-47). Subsequent to this, Mackin and his family lived in the barricaded area of the Catholic community on relief funds until they received an emergency house in Andersonstown. He lived there for a period of time and his mother has continued to live there to the present day. (Mackin, 748). In late 1969 and early 1970, at the time when the Westminster Parliament sent in the British Army to aid in containing the violence and the Catholic communities began to organize against the Loyalists and British, toward the achievement of nationalistic goals, Mackin joined "Na Fianna Eireann" ("Soldiers of Ireland"), which was the youth branch of the Republican Movement. (Mackin, 749-50). As a member of "Na Fianna Eireann," Mackin was active in street demonstrations and street riots and performed reconnaissance tasks and gathered intelligence in cooperation with the IRA. (Mackin, 760). In 1971, Mackin became active in the Republican Movement on a full-time basis. That year Mackin was arrested by British troops and interrogated at the Andersonstown barracks. As he was too young to be interned, he was released after having refused to answer any of the authorities' questions. (Mackin, 763-64). During the 1972 truce negotiations with the British Army, Mackin functioned as an intermediary and negotiator in Andersonstown with the British Army; he had face-to-face meetings on two occasions with the local British Commander and was recognized as an officer in command of the First Battalion, Belfast Brigade, Irish Republican Army. (Mackin, 810-11). That same year Mackin was arrested, interrogated, tried and convicted on charges of membership in the IRA. At that proceeding, Mackin refused to recognize the jurisdiction and legality of the court and refused to take part in the trial, asserting that he was an Irish Republican. (Mackin, 765-72). He was sentenced to five years imprisonment at Long Kesh for the offense of membership in the PIRA. (Mackin, 773). At Long Kesh, Mackin was granted political status* and was commanding officer of one of the PIRA sub-organizations within the prison. He also represented 90 PIRA prisoners in the compound in negotiations with the British prison authorities. (Mackin, 779, 781-83).

In 1976 Mr. Mackin was released from prison and he returned to his home in West Belfast. (Mackin, 784). During the years following his release, Mackin was the subject of continuous personal surveillance and harassment by the RUC and the British Army. Indeed, Mackin was stopped on the average of three times a week for identity checks by the military forces, and his home, which was in direct view of the Woodbourne Army base, was subject to constant camera surveillance, photographing anyone entering or leaving his home. (Mackin, 784-88, 792-97). Furthermore, the local British regiment made a number of threats on his life. (Mackin, 797). Indeed, Mr. Mackin rarely spent a night at home with his wife and child due to the constant photographic surveillance of his home. (Mackin, 814, 817). Also, during this time Mackin helped to establish and coordinate the efficient operation of the "people's taxi" system in Belfast.

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*According to Mackin, in order to be granted political status, one of the proscribed organizations, the Ulster Defence Association or PIRA, was required to claim that the prisoner was a member or supporter, and the offense committed had to be relevant to the contemporary political insurrection. (Mackin, 781).

At the hearing, Desmond Mackin testified that on March 16, 1978, he was (1) an active member of the "Provisional Wing of the Irish Republican Army . . . First Battalion, Belfast Brigade" (Mackin, 1162); (2) "chief organizer attached to Belfast Sinn Fein, Belfast executive" (Mackin, 813); and (3) a coordinator for the Republican Movement. (Mackin, id.) Mackin described his function as coordinator for the Republican Movement as one of organizing people to support the movement and the guerilla war and attempting to coordinate the activities of the anti-British troops in West Belfast. (Mackin, 813-14). Mackin also testified that he had been identified by the British Army intelligence as a Republican activist and that his photograph had been carried by Army members and taped to the butt of the rifles of some British Army intelligence officers.* (Mackin, 814-15). Following the March 16, 1978 incident, (Mackin, 816-30), Mr. Mackin, having been released on bail, returned to his community and resumed his political activities in the Republican Movement, working out of the Sinn Fein office center in Andersonstown, organizing street demonstrations against the British military and governmental presence in Northern Ireland, and in protest against the brutal treatment of prisoners. (Mackin, 844, 846-48). After several attempts and threats were made on Mackin's life, having been subjected to frequent street interrogation, and after having his home searched on a rather routine basis, Mackin fled to the Republic of Ireland. (Mackin, 852-57). In the Republic, Mackin continued his commitment to nationalistic political activism and became involved in organizing the Republican Movement in several of the border counties. (Mackin, 857, 868). In July of 1980, Mr. Mackin was assigned to the Foreign Affairs Department of Sinn Fein and the Republican Movement and was sent to the United States to speak to Irish-American groups, lobbyists and journalists to publicize the Irish question and speak on behalf of Republican prisoners in Northern Ireland.* In fact, Mr. Mackin received a commendation from the Pennsylvania legislature for his determination and efforts in promoting civil and human rights. (Mackin, 868-71; Resp. Ex. J).

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*Indeed, Mackin's testimony in this regard comports with the statementsof the four soldiers. For example, Soldier A acknowledged:

> I was able to recognize them because I had been operating in the Andersonstown area, and had been familiarised with the photographs and descriptions of persons who were of relevance to me duties.

(Doc. Ev. 16).

In addition, Mackin testified that he is presently a member of the Republican Movement (Mackin, 727), which he described as:

> . . . a steady tradition of rebellion in Ireland against British rule. It has a traditional link going back to . . . 1798, when it was founded under the name of United Irishmen. . . . Irish Republicanism is a non-sectarian concept. It's anti-royalty and monarchist.

(Mackin, 728). And in clarifying the role of the PIRA as the present day military wing of the Republican Movement, Mackin further stated that the aims of the PIRA are identical to those of the IRA whose members rebelled in 1916, conducting a campaign of violence against the British Army and British military institutions, in opposition to British domination, and in the hope of establishing a democratic 32-county Irish Republic. (Mackin, 731-32).

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*However, Mackin entered this country illegally (Mackin, 875) and was at the time of the issuance of the warrant on this extradition complaint, under arrest by the Immigration and Naturalization Service and the subject of a deportation proceeding based on his entry into this country without a visa. (Gov't. Exs. 9, 10, 11 and 12). The deportation proceeding has been "held in abeyance during the pendency of the extradition" (1676) and an order of deportation is not outstanding. (1405). In fact, Mackin has disclaimed an interest in remaining in the United States and instead has expressed a desire to return to the Republic of Ireland (1677). In this connection, it may be noted that under the Dual Jurisdiction Act Mackin may be tried in the Republic of Ireland on the charges for which extradition is sought. (Garrett, 1059).

In light of the foregoing recitation of the evidence, this Court concludes that it is beyond cavil that on March 16, 1978 Desmond Mackin was a committed activist in the Republican Movement and in the PIRA. Accordingly, to the extent that Mackin's acts on March 16, 1978 were in conformity with his general functions as a member of the Republican Movement and the PIRA, we find that Mackin bore no personal ill will or malice toward the victim-soldier, but acted in accord with the political activity contemplated by the political offense exception. See, Ramos v. Diaz, supra, 179 F. Supp. at 463.

C. The Requirement That The Act Be Committed "Incidental To" and "In Furtherance Of" a Severe Political Disturbance

Having determined that respondent Mackin has satisfied the first two elements of the political offense exception we now turn to the one remaining issue that must be analyzed: whether the act of March 16, 1978 was "incidental to" and "in furtherance of" the political uprising described above. With respect to this issue the Government's submissions are unclear as to whether they argue that: (1) Mackin's affirmative denial of the offense charged in the extradition papers precludes application of the political offense exception; or that (2) Mackin's affirmative denials of any overt act severs any arguable connection between his activities of March 16, 1978 and the political disturbance. We presume the latter, because requiring Mackin to admit to the commission of the charged offense would put him in the untenable position of requiring him to either perjure himself or waive his Fifth Amendment privilege against self-incrimination or the corresponding British testimonial privilege in the hope that this Court would not extradite him. Furthermore, there is nothing in the case law which indicates that the respondent must admit to the commission of the charged offense in order to raise the political offense exception; in fact, in Ramos v. Diaz, the defendants denied the commission of the offense.

Moreover, based on the following discussion, this Court concludes that Mackin's acts either as alleged in the extradition papers or according to his version of the events were "incidental to" and "in furtherance of" a severe political disturbance such as a war, revolution, rebellion or uprising.

The sequence of events on March 16, 1978 recited in the extradition documents have been discussed in the probable cause section of this opinion and need not be reviewed again here.

According to Mackin, the events and circumstances of March 16, 1978 are as follows. As mentioned above, at that time Mackin was an active member of the PIRA, chief organizer attached to the Belfast Sinn Fein and a local coordinator for the Republican Movement. (Mackin, 813, 1162). As such, Mackin was particularly familiar with the Rossnareen-Ramoan Gardens area and was "at all times prepared to take on a member of the British Army. . . ." (Mackin, 1174, 817-18).

On the morning of March 16, 1978 Desmond Mackin and his friend Robert Gamble ("Gamble") began their day by searching for and obtaining information regarding the whereabouts of Mackin's missing "people's taxi" service cab. They were directed to the Rossnareen-Ramoan Gardens area where they began an active search on foot. After walking in that vicinity for approximately fifteen minutes, Mackin and Gamble noticed a group of strangers, fairly young men with short haircuts,* conspicuously standing on certain street corners. Mackin was able to identify the group as "strangers" in the area, since he knew almost everyone in the community, at least by sight, and since the men acted in a manner which was, in general, out of the ordinary for residents of Andersonstown. Furthermore, the group of men appeared to be shadowing Mackin and Gamble, following them block by block. (Mackin, 816-20).

Mackin and Gamble also became aware of other indications of unusual activity. The streets, usually crowded with children playing, were quiet and a mini-van travelled through the streets while someone inside the van was apparently taking photographs from its window. In addition, they observed two British Army helicopters hovering overhead, one over the Turf Lodge and the other over the area to the south. (Mackin, 820-22).

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*According to Mackin, it is the fashion for Irish men to wear their hair slightly long. Thus, the strangers' short haircuts added to Mackin's suspicion that they did not belong in the area. (Mackin, 819).

After approximately one-half hour, in an effort to escape from the circle of strangers being formed around them, Mackin and Gamble decided to proceed to Glen Road, a major, heavily-trafficked artery where the "people's taxi" operated, in the hopes of avoiding a confrontation or to position themselves in a more tactically desirable location. By this point Mackin had definitely concluded that the strangers were undercover British soldiers and naturally, the search for the missing taxi was abandoned. (Mackin, 822-23; 1165-67; 1178). When Mackin and Gamble reached Glen Road they noticed on the opposite side of the road one of the "strangers" who they had seen earlier (identified as Soldier A or Soldier Stephen Wooten in the extradition documents). Determining that he was the "weakest link" in the group of undercover soldiers, Mackin approached him and confronted him with a view towards establishing his identity and the purpose of his presence in the area in order to alert one of the local PIRA defense units which could properly deal with the situation. (Mackin, 824). Indeed, according to the sworn statement of Soldier A, Mackin inquired as to who he was and what he was doing in the area. (Doc. Ev. 16). In response, Soldier A, a specialist in anti-terrorism in Northern Ireland (Doc. Ev. 13), who had been operating in the Andersonstown area and was on plain clothes duty in Andersonstown on March 16, 1978, recognized Mackin and Gamble from "photographs and descriptions of persons who were of relevance" to his duties, (Doc. Ev. 16), and drew his pistol and began firing. (Mackin, 825).

Mackin and Gamble, who were both unarmed, began to assault Soldier A and both were severely wounded by the ensuing gunfire from Soldier A and the back-up members of his patrol. (Mackin, 825-826). In either their depositions or sworn statements Soldiers A, B, C and D stated that they recognized Mackin. (Doc. Ev. 10, 16, 18, 37, 49).

For the purposes of our analysis here, the similarity between Mackin's version of the events and that of the United Kingdom regarding the initial encounter between Mackin and Soldier A, the "overt act" which triggered the following sequence of events, obviates the need for this Court to choose between the two versions.* Contrary to the Government's suggestion, Mackin has not affirmatively denied committing any overt act, but denies the events following the initial confrontation, as recited in the extradition documents.

In so far as the exception requires that the act be "incidental to" a severe political disturbance and to the extent that this has been interpreted to require some degree of contemporaneity between the commission of the act and the political uprising we rely on our discussion above regarding the history and past decade of political violence in Northern Ireland. Based on that discussion this Court has already concluded that there was a political uprising in Andersonstown on March 16, 1978. Furthermore, as the court reasoned in In re McMullen

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*It is not surprising that in the statement given to the RUC, (Doc. Ev. 101-02), Mackin did not relate his initial verbal confrontation with Soldier A nor that the encounter was initiated by him as part of his duties as an active member of the PIRA since PIRA membership is a crime, punishable by a substantial term of imprisonment.

> [a] political disturbance, with terrorist activity spanning a long period of time cannot be disregarded even if, in fact, the PIRA lifted not one single finger in either Northern Ireland or Great Britain to further its cause of nationalism of Ulster on the day Claro Barracks were bombed.

Supra, at 5.

The political offense doctrine also requires that the act be committed "in furtherance of" the political uprising: there must be a substantial tie between the specific act and the political activity and goals of the uprising group. Abu Eain v. Wilkes, supra, 641 F.2d at 520-23. Absent this direct link "isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce." Id. at 521. In the case before this Court, although the act was neither pre-planned nor directed by the PIRA (Mackin, 1171-74), the necessity of the situation caused Mackin's innocent search for his taxi to effectively become a reconnaissance mission, a function of any military or paramilitary personnel and as Mackin testified, "part and parcel" of his official duties as a member in the First Battalion of the PIRA. (Mackin, 1162).

In fact, while we are in no way bound by the way in which the United Kingdom, the requesting Party, views Mackin's act, we mention that he was arrested under section 10 of the 1973 Emergency Provisions Act, i.e., as a suspected terrorist,* and thus channeled into the Diplock court system for trial. The authorities made this conscious decision, having the option of treating Mackin's offense as a scheduled one, subject to the procedures established by the Emergency Powers Act or as a descheduled offense, which would be processed and prosecuted under the ordinary criminal procedures. (See discussion, supra, at 70). In fact, Government's witness Lynagh agreed that the probable reason for the election to proceed against Mackin under the emergency legislation was the fact that he was suspected as an active member of the PIRA. (Lynagh, 1603).

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*Notably, the Act defines "terrorism" as follows:

> the use of violence for political ends . . . includ[ing] any use of violence for the purpose of putting the public or any section of the public in fear.

The Act further defines "terrorist" as:

> a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism.

(Resp. Ex. N, section 28; see also, Lynagh, 1597).

Furthermore, given the quality of the overt act and the events which ensued, according to either the United Kingdom's version or Mackin's version of the incident, the pending case is easily distinguishable from Abu Eain v. Wilkes. Unlike the offense at issue in Abu Eain, which was an instance of random terrorism directed at the civilian population, Mackin's act was aimed directly at a member of the British Army, the opposition force, who was performing his duties as an intelligence gathering plainclothes soldier in Andersonstown on March 16, 1978. See also, Ornelas v. Ruiz. In short, it was a confrontation between "two parties in the State as to which is to have the government in its hands. . . ." In re Castioni, supra, 1 Q.B. at 156. And clearly, while this one act could not possibly bring to fruition the goals of the PIRA, it was undoubtedly free from personal motive and substantially linked to the traditional goal and strategy of the IRA and PIRA: an independent Ireland, free from British rule through the use of violence. Indeed, if the offense committed was anarchistic in nature and focused toward the disruption of the social fabric rather than the political structure of the state, we would not conclude that the act bore any connection to the political activity nor that it was committed "in furtherance of" a political uprising. Yet, given the nature of Mackin's act and the totality of the incident, the well reasoned limitations circumscribing the application of the political offense exception set forth in In re Meunier and Abu Eain v. Wilkes are inappropriate in the case before this Court. We wish to make clear however, that this Court shares the concern expressed by the Seventh Circuit in Abu Eain that the political offense exception should not be applied so as to create a safe haven for terrorists in the United States.

One other matter ought to be addressed before we conclude our opinion. At oral argument, the Government, relying on In re Gonzalez, suggested that in any event extradition should not be barred because Mr. Mackin was not going to be extradited to a totalitarian government. (1679-82). The Government's reliance on In re Gonzalez, is misplaced, since in that case the Court considered the nature of the government of the requesting country in dicta only, holding however, that there was no "uprising" or political disturbance in the requesting country at the time the alleged crimes were committed. Supra, 217 F. Supp. at 721 & n. 9.* Furthermore, to adopt the Government's argument would require this Court to engage in the analysis of a political question, to determine the nature of a present political structure in a foreign country, which the Government severely admonished against in its jurisdictional argument.

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*In re Gonzalez is the only case in American jurisprudence which mentioned the nature of the government of the requesting country in analyzing the applicability of the political offense exception.

CONCLUSION

In conclusion the Court holds that while there was sufficient probable cause to certify extradition, respondent Mackin has satisfied the requirements of the political offense exception. Accordingly, the United Kingdom's request for the extradition of Desmond Mackin is denied under the provisions of the Extradition Treaty between the United States of America and the United Kingdom entered into force on January 21, 1977 and the warrant of arrest issued on November 19, 1980 is ordered vacated.*

DATED: New York, New York
August 13, 1981

NAOMI REICE BUCHWALD
UNITED STATES MAGISTRATE

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*At oral argument the Government requested a stay of this decision pending appeal in the event that it was adverse to the United Kingdom. (1702). In light of our understanding of the law to the effect that extradition orders are *sui generis* and not appealable as of right, we requested further briefing on the Government's request. *Jhirad* v. *Ferrandina*, *supra*, 536 F.2d at 482. By letter, dated August 3, 1981, the Government appears to have withdrawn its request for a stay, relying instead on authority permitting it to refile its extradition request before another judicial officer. Indeed, the Government cites *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1063) in which a second request for extradition was filed, after the United States Commissioner denied extradition on the ground that the offenses charged were political

Footnote continued on p. 101

Footnote continued from p. 100

offenses. While a holding that the Government be required to refile an extradition request rather than appeal makes eminent sense when the denial of the request turns on an issue of probable cause, we do not believe that the same rationale is necessarily appropriate to cases in which extradition is denied on the ground that the political offense exception applies. Traditionally the Government has the right to resubmit an indictment to a grand jury or a complaint to a magistrate, if the grand jury or magistrate rejected the initial submission on probable cause grounds. In contrast to the factual nature of a probable cause determination, a finding that the political exception applies is essentially a determination of law presenting a typical appellate issue. Nevertheless, we cannot disagree with the Government's conclusion that the relevant precedent supports refiling, rather than appeal.

[Corrected Copy]

81-1324

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 81-1324, 81-3064

In the Matter of the Requested Extradition of Desmond Mackin
By the Government of the United Kingdom of
Great Britain and Northern Ireland

UNITED STATES OF AMERICA
Petitioner-Appellant,

—v.—

DESMOND MACKIN,

Respondent-Appellee.

ON APPEAL FROM AND PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA and BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 81-1324, 81-3064

In The Matter Of The Requested Extradition Of
Desmond Mackin By The Government Of
The United Kingdom of Great Britain
And Northern Ireland

UNITED STATES OF AMERICA,
Petitioner-Appellant,

—v.—

DESMOND MACKIN,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA and BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

Preliminary Statement

This is an appeal from a decision and order of the United States District Court for the Southern District of New York entered by the Honorable Naomi R. Buchwald, United States Magistrate, acting for that Court pursuant to 18 U.S.C. § 3184 and Rule 9 of the Local Rules for the United States District Court for the Southern District of New York, denying the requested extradition of Desmond Mackin by the Government of the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") under the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (the "Treaty"), 28 U.S.T. 227, T.I.A.S. 8486.*

The requested extradition was based upon Mackin's indictment in Northern Ireland on charges of attempted murder, contrary to common law; wounding with intent to do grievous bodily harm, contrary to the Offenses Against the Person Act of 1861; and possession of firearms and ammunition with intent, in contravention of Section 14 of the Firearms Act (Northern Ireland) 1969. After having been released on bail in Northern Ireland, Mackin failed to appear for his trial on September 25, 1978, and a bench warrant was issued for his arrest. Mackin thereafter entered the United States illegally; upon his apprehension by the Immigration and Naturalization Service extradition proceedings were initiated in October, 1980. On August 13, 1981, the court below filed its decision. The court held that probable cause existed to believe that Mackin, a native of Northern Ireland, was guilty of two of the crimes charged in the extradition complaint and that these crimes are extraditable offenses under Article III of the Treaty. However, the court held, as a matter of law, that extradition was barred under the political offense exception of Article V(1)(C)(i) of the Treaty and consequently refused to certify the proceedings to the Secretary of State pursuant to 18 U.S.C. § 3184.

On August 14, 1981, the Government filed an appeal urging this Court to reverse and vacate the finding that the extraditable offenses charged were political crimes, as a matter of law, and that extradition was thus barred. On August 19, 1981, the Government filed a petition for a writ of mandamus seeking an order directing Magistrate Buchwald to vacate her order of August 13, 1981, terminating the extradition proceeding; to issue a warrant for the commitment of Mackin; and to certify to the Secretary of State that Mackin may be extradited to the United Kingdom. By order of this Court dated September 8, 1981, this appeal and the petition for a writ of mandamus were consolidated. This brief is respectfully submitted in support of both the petition for mandamus and the underlying appeal.*

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*Pursuant to Article XIV of the Treaty the United States of America represents the United Kingdom in this matter

ISSUES PRESENTED

1. Whether this Court has jurisdiction to hear the appeal from the decision of Magistrate Buchwald holding as a matter of law that the crimes charged in the extradition proceedings below were political offenses under Article V(1)(C)(i) of the Treaty.

2. Whether the court below erred in concluding that it rather than the Secretary of State had jurisdiction to determine that the crimes charged were political offenses under Article V(1)(C)(i) of the Treaty.

3. Assuming *arguendo* that the court below had jurisdiction to determine whether the extraditable crimes under the Treaty were political offenses within Article V(1)(C)(i), whether the Court erred in finding as a matter of law that the political offense exception to the Treaty barred Mackin's extradition.

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*As noted *infra*, p. 13, on August 28, 1981, Mackin filed a petition for a writ of habeas corpus and a motion for his immediate release from custody directly with this Court. On September 1, 1981, Mackin's motion and petition were referred to the panel of this Court which was scheduled to hear the Government's motion for a stay pending appeal. On September 8, 1981, the panel (Feinberg, Mansfield, and Van Graafeiland, *JJ.*) denied Mackin's motion for release and consolidated his petition for a writ of habeas corpus with the Government's pending appeal and petition for a writ of mandamus. In its return to Mackin's petition for a writ of habeas corpus the Government has raised as an affirmative defense and a counterclaim for declaratory relief the same allegations of error that were raised in its appeal and petition for a writ of mandamus. Consequently this brief is also submitted in response to Mackin's habeas corpus action.

STATEMENT OF FACTS

A. Mackin's Attempt To Murder A British Soldier

On March 16, 1978, at about 1:00 P.M., Stephen Wooton, a British soldier stationed in Belfast, Northern Ireland (referred to as Soldier A in the extradition documents accompanying the complaint), was standing at a bus stop on the northern side of Glen Road, Andersonstown, Belfast, almost directly opposite a housing complex called Ramoan Gardens (Cmplt. 10-17).* He was in civilian clothes, as were 3 other soldiers in the vicinity identified as "B," "C" and "D." These soldiers were part of a larger patrol of men engaged in a passive intelligence patrol in this part of West Belfast. (Cmplt. 15).

As Wooton was standing at the bus stop he saw two men cross Glen Road and approach him. Wooton, who identified these men as Mackin and one Bobby Gamble, turned away from them as they approached, but Mackin caught hold of Wooton by his left shoulder and pulled him round to face him. Mackin asked Wooton what he was doing in the area and told him to take his hands out of his pockets. Wooton stated that he saw Mackin place his hand inside his coat, in the area of the waist band. At this stage Wooton started moving backwards and drew his pistol, a 9 mm. Browning. As he was doing this Gamble moved forward and tackled Wooton. Before the men fell to the ground Wooton fired one shot at Gamble but missed. (Cmplt. 10-17). A struggle ensued during which Wooton fired again, without hitting either Gamble or Mackin. However, Wooton was himself struck in the upper right thigh by a

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*Numerical references preceded by the letters "Cmplt." refer to the paginated statements, depositions, warrants, and other papers, contained in the extradition documents filed in the District Court simultaneously with the complaint for extradition dated November 19, 1980. These documents are required under Article VII of the Treaty and the factual assertions therein cannot be contradicted. *See Collins* v. *Loisel*, 259 U.S. 309 (1922); *Shapiro* v. *Ferrandina*, 478 F.2d 894, 904 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973).

bullet.* Mackin and Gamble both ran off in a southerly direction across Glen Road. (Cmplt. 19).

Soldiers B, C and D corroborated Wooton's version of the shooting. Soldiers B and C saw the struggle among Mackin, Gamble and Wooton; during this struggle, Soldier B saw Mackin produce a pistol from the front of his clothing in the area of his waistband and fire at Wooton. (Cmplt. 19). Soldier D also saw Mackin with a gun. (Cmplt. 39). Soldiers C and D chased Mackin to behind a nearby apartment; as they placed Mackin in custody Soldier C heard Mackin say "Don't shoot me, I've thrown away my gun." (Cmplt. 30, 38).

Mackin was arrested and charged with attempted murder of Wooton. At his initial court appearance on March 24, he was remanded in custody. However, on October 3, 1978, he was admitted to bail. After being held for trial on January 29, 1979, on charges of attempted murder contrary to common law; wounding with intent, contrary to Section 18 of the Offenses Against the Person Act 1861; and possession of a firearm and ammunition with intent, contrary to Section 14 of the Firearms Act (Northern Ireland) 1969, Mackin was continued on bail. He failed to appear for his trial on September 25, 1979, and a warrant for his arrest was issued by the Crown Court for the Eastern Circuit in Northern Ireland. (Cmplt. Exhibit HC/1).

B. Mackin's Illegal Entry Into The United States And His Subsequent Apprehension

In August 1980, Mackin surreptitiously entered the United States at an unknown point over the United States-Canadian border, in violation of 8 U.S.C. § 1325. (MX K; Tr. 1454-56).**

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*This bullet was later found to be .38 calibre. (Cmplt. 72-74, 82).

**"MX" refers to exhibits offered by Mackin at the extradition hearing; [Date] Tr." refers to the transcript of proceedings held in the District Court on the indicated date.

On October 1, 1980, he was arrested by agents of the Immigration and Naturalization Service in Manhattan and was held at the Metropolitan Correctional Center pending administrative deportation proceedings pursuant to 8 U.S.C. §1252(b).*

At his deportation hearing on Saturday, October 4, 1980, Mackin requested his immediate deportation to the Republic of Ireland. (Tr. 1454-56). On that same date, however, the United Kingdom, by appropriate diplomatic request, sought Mackin's provisional arrest pursuant to Article VII of the Treaty. On October 6, 1980, a complaint and warrant for Mackin's provisional arrest were filed in Part I of the United States District Court for the Southern District of New York. On October 7, 1980, Mackin applied for bail, which was denied after a hearing. (10/7/80 Tr.). He was ordered to remain in custody pending completion of the extradition proceedings. On November 19, 1980, an extradition complaint was filed in the District Court, and an arrest warrant was signed by the Honorable Richard Owen, sitting in Part I of the District Court. Mackin was again ordered to be held in custody pending further order of the Court. Thereafter, on consent of the parties the extradition proceedings were adjourned in order that Mackin could have time to prepare his defense.

On February 5, 1981, Mackin filed a renewed application for bail before the Honorable Kevin T. Duffy, United States District Judge, in which he alleged that his preparation for his

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*At the extradition hearing, Mackin testified that he left Belfast and resettled in the Republic of Ireland while on bail pending trial. Thus, Mackin concedes that his illegal entry into the United States was in no way related to his flight from the outstanding criminal charges lodged against him by the United Kingdom, nor was it for the purpose of obtaining asylum, the historic and antecedent purpose underlying the political offense exception to extradition treaties. Carbonneau, The Political Offense Exception to Extradition and Transnational Terrorist, 1 A.S.I.L.S. Int. L. Journal 1, 2-10 (1977). His conduct and underlying intent in entering the United States thus place him apart from previously reported decisions under the political offense exception from *In re Castioni* [1891] Q.B. 149 to *Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981).

defense in the extradition proceedings would require considerable time and that he should be released from custody pending the completion of the extradition proceeding. (Memorandum of Law in Support of Bail, dated February 4, 1981, at 9). Thereafter, Judge Duffy denied bail and referred the matter to Magistrate Buchwald for a hearing on the extradition complaint.

C. The Extradition Hearing

Between February 20, 1981, and June 18, 1981, lengthy hearings and arguments were held before Magistrate Buchwald. Three witnesses testified on the issue of probable cause: Dr. Dominick DiMaio, a forensic pathologist, on behalf of Mackin; Special Agent Rodger Asbury of the Federal Bureau of Investigation, a ballistics expert, on behalf of the Government; and Dr. Brian W. Blackbourne, Deputy Chief Medical Examiner for the District of Columbia, on behalf of the Government. On March 5, 1981, the Court found that probable cause to believe that Mackin committed extraditable offenses* existed pursuant to Article IX(1) of the Treaty. (Tr. 319-22).**

Subsequently, eight additional witnesses were called by the parties to testify with respect to Mackin's claim that his extradition should be barred under Article V(1)(C)(i) of the Treaty exempting extradition for crimes of a political character.*** In support of his defense under Article V(1)(C)(i) of the Treaty Mackin presented three expert witnesses: Jack Holland, a journalist; Richard Harvey, a barrister; and Rona Fields, a former college professor.* Mackin also testified in his own behalf. The Government presented the testimony of John Brian Garrett, a solicitor, member of the British Sections of Amnesty International, and former Chairman of the Northern Ireland Labour Party; Kenneth Masterson, a barrister and the Superintendent of the Royal Ulster Constabulary stationed in Andersonstown, Belfast, North Ireland; Vincent Lynagh, Legal Advisor to the Royal Ulster Constabulary; and Frank Perez, Deputy Assistant Secretary of the United States Department of State.

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*The Magistrate found that there was probable cause to believe that Mackin had a gun and fired it, although she found no probable cause to believe that Mackin had fired the shot that hit Wooton. Thus, although the Magistrate did not specifically so hold, she apparently found that there was no probable cause to believe that Mackin had committed the offense of wounding. While we believe that the Magistrate erred in so holding, we do not challenge that finding on this appeal.

**References to "Tr." refer to the transcript of the extradition hearing conducted in the District Court before Magistrate Buchwald.

***The court below correctly ruled that issues relating to Article V(1)(C)(ii), *i.e.*, proof that the request for extradition was made with a view to try or punish him for an offense of a political character, were within the sole jurisdiction of the Secretary of State. However, the court rejected the Government's contention that issues arising under Article V(1)(C)(i) were also within the sole jurisdiction of the Executive Branch. See Point II, *infra*.

Mackin testified that he was born in Belfast on July 8, 1955, but was presently residing in the Republic of Ireland. (Tr. 725). He stated that he was a member of the "Republican Movement" which had three branches: the Irish Republican Army ("IRA"); the Sinn Fein political party; and the Na Fianna Eirrein, a youth group.** Mackin then recited his version of the history of the British presence in Northern Ireland. (Tr. 727-56). He claimed that he came from a Republican family, and that after joining the Na Fianna Eirrein, he was stopped by the Royal Ulster Constabulary in 1970. (Tr. 740-42, 757, 759).*** According to Mackin, when internment without trial was instituted by the Northern Ireland government in 1971, he quit his job for involvement in the "resistance movement," which he described as involving passive resistance. (Tr. 761; Op. 59-61).**** Mackin also stated that the Provisional

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*The Court below qualified each of the above witnesses as experts over the Government's objection.

**Initially Mackin said only that he was a member of the "Republican movement" and of the Na Fianna Eirrein; only later did he amend his testimony to include membership in the Provisional Irish Republican Army. (Tr. 813, 1162).

***On one occasion Mackin was stopped as a result of a car theft, which he testified the authorities "didn't attach much importance to." (Tr. 759).

****"Op." refers to the opinion rendered by Magistrate Buchwald.

Irish Republican Army ("PIRA")—the military wing of the IRA—stepped up its violence during the period of internment. (Tr. 726).[*]

According to Mackin, he was injured in an incident in 1971 related to "the troubles," but refused to talk to police about it. (Tr. 762-64). In August or September 1972, he was arrested while disguised and carrying a false identification on charges arising out of an ambush incident. (Tr. 765, 770). He was charged with attempted murder, illegal possession of a firearm, causing grievous bodily harm, and membership in the PIRA. After a jury trial, during which Mackin refused to recognize the jurisdiction of the court (Tr. 771),[**] he was convicted of membership in the PIRA and acquitted of the other counts. (Tr. 772). He received a five-year sentence, although it is apparent that a substantial portion of the sentence was remitted. (Tr. 772-73, 782). Mackin claimed that while incarcerated, he received special category status as a member of the IRA. (Tr. 773-74, 778-80).[***]

Mackin claimed that in late 1977 and early 1978 there was a "dramatic increase" in PIRA activity, aimed at tying the British army down to guard duty at important economic and governmental sites and taking them out of IRA strongholds. (Tr. 800-02).[*] According to Mackin, after his release he was subject to constant harassment and surveillance by the British Army. He claimed that at the time of his 1978 arrest he was "chief organizer" attached to the Belfast Sinn Fein, and that he never slept at home for fear of capture and assassination. Despite all this, he admitted that he had not been arrested by either the police or the army, and that he chose to live immediately adjacent to a British army base. (Tr. 786, 794-96, 813-14, 817, 1569-70).

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[*] Statistical evidence presented in the court below established that the violence in Northern Ireland reached a high point in 1972—the year after internment was instituted—and has declined ever since. (Tr. 1254-60; MX U).

[**] By contrast to these earlier incidents, when Mackin was arrested for the instant offense he gave a statement and recognized the jurisdiction of the court. (Tr. 830, 835-40; Cmplt. 3, 109).

[**] Prior to March 1976, convicted members of the IRA or the rival Protestant Ulster Defense Association ("UDA") were given special political status in Northern Ireland prisons. Beginning in March 1976 that status was abolished for new prisoners, and on March 26, 1980, it was completely abolished. See *McFeeley* v. *United Kingdom*, Application No. 8317/78 (Partial Decision of the European Commission on Human Rights, adopted May 15, 1980), holding in part that Northern Ireland prisoners were not entitled to the status of political prisoners. (See also GX 16, Tr. 1573). "GX" refers to Government exhibits at the extradition hearing.

Mackin then gave his version of the events of March 16, 1978. According to Mackin, he and his friend Gamble were looking for a taxi that had been stolen from Mackin's taxi business. (Tr. 817). Although Mackin had been told where the taxi was, he claimed that he was having difficulty finding it. During his search he noticed "strangers" in the area, who he was afraid might be following him. (Tr. 819-21).[**] He testified that he and Gamble tried to get away but that one of the "strangers" drew a gun and fired at them. (Tr. 822-24, 1164, 1166-67). Mackin claimed that he and Gamble were both unarmed, never fired at Wooton, and did nothing prior to the soldier's supposed attack on them. He claimed he fled only in fear. (Tr. 824-26).

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[*] Mackin's testimony, obviously tailored to his effort to establish that there was a political disturbance in Northern Ireland in 1978, was contradicted by statistics showing a steady decline in violence after 1972. (Tr. 1243-60, MX U). Indeed, a large part of the violence in early 1978 resulted from a single incident: the bombing of a restaurant in which 12 civilians were murdered. (Tr. 514-15). This sort of terrorist incident does not fall within the political offense doctrine. *Abu Eain* v. *Wilkes*, 641 F.2d 504, 519-23 (7th Cir. 1981). *See* pp. 41-43, *infra*.

[**] In a statement given after his arrest, Mackin gave no indication that he knew there were any British soldiers in the area, and denied that he knew Wooton was a soldier. At the hearing, however, he gave self-serving testimony that he did, in fact, believe the "strangers" were soldiers, and asserted, incredibly, that there were two army helicopters hovering overhead as headquarters for a surreptitious undercover operation. (Tr. 1253-54). The claim that Mackin knew that Wooton was a soldier is obviously an afterthought arising from his attempt to establish that his offense was political in nature.

Thus, Mackin flatly denied having committed the offenses with which he was charged. (Tr. 1177).

D. The Decision Below

In a lengthy opinion, Magistrate Buchwald found that there was probable cause to believe that Mackin had committed two of the offenses for which extradition was sought, in that he had a gun and fired it during the scuffle with Wooton. (Op. 21). However, the lower court rejected the Government's contention that it lacked jurisdiction to determine whether Mackin's offense was "regarded by the requested Party as one of a political character" within the meaning of Article V(1)(C)(i) of the Treaty (Op. 36-43) and went on to hold that extradition was barred because Mackin's crimes were political in nature. The Magistrate noted that Mackin's offenses were not claimed to be "pure" political offenses—which are normally "limited to treason, sedition and espionage" (Op. 23)—but rather that he claimed that they were "relative" political offenses, in that they were " 'incidental to severe political disturbances such as war, revolution and rebellion.' " (Op. 27). *See Sindona* v. *Grant*, 619 F.2d 167, 173 (2d Cir. 1980).

The lower court applied a three-prong test to analyze the applicability of the political offense exception to this extradition proceeding:

> "(1) whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense; (2) whether Mackin was a member of the uprising group; and (3) whether the offense was 'incidental to' and 'in furtherance of' the political uprising."

(Op. 47). With respect to the first point, the Magistrate conducted a wide-ranging inquiry into the history of Irish-British relations and recent conditions in Ireland, including alleged religious discrimination and law enforcement techniques. Without regard to the official position of the State Department (GX

16, Tr. 1573), and despite statistical evidence showing a consistently decreasing level of violent activity in Northern Ireland, the Magistrate in effect accorded legitimacy to the terrorist PIRA (Tr. 514-16, 524, 1334-1403; GX 16) as a political group which is "the ideological successor of the IRA" and "committed to the traditional goal of Irish nationalism" as opposed to the "British domination of Northern Ireland." (Op. 49-84). The Magistrate also uncritically accepted Mackin's testimony concerning his membership in the PIRA and that he "bore no personal ill will or malice" toward Wooton. (Op. 84-91).* Finally, despite the fact that Mackin denied committing any assault at all, the Magistrate found that the assault was committed "in furtherance of" the political disturbance, primarily because the altercation was with a British soldier. (Op. 91-98). Thus, the lower court concluded that Mackin had sustained his burden of establishing that his offense was of a political character and ruled that extradition was barred.

E. Subsequent Judicial Proceedings

On August 13, 1981, relying upon the decision of the Court of Appeals for the Ninth Circuit in *Hooker* v. *Klein*, 573 F.2d 1360 (9th Cir. 1978), and the analogous case of *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963), the Government filed a second complaint for Mackin's extradition in the District Court, before the Honorable Leonard B. Sand. Judge Sand thereafter entered a stay of the Magistrate's decision pending his review of the matter. (8/13/81 Tr. 17). On August 14, 1981, Judge Sand advised the parties that review of the Magistrate's decision should be made by an expedited appeal to the Court of Appeals rather than by refiling as was done in *In re Gonzalez*, *supra*. (8/14/81 Tr. 3).

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*The Magistrate also made numerous findings concerning alleged harassment of Mackin by British soldiers—findings which are essentially irrelevant to the question of extradition. *See e.g., Gallina* v. *Fraser*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

Thereafter the Government sought and obtained an interim stay from Magistrate Buchwald pending further order of this Court. On August 14, 1981, the Government filed a notice of appeal in this proceeding and on August 19, 1981, in compliance with the Magistrate's interim stay, it moved in this Court for a stay pending an expedited appeal. On August 21, 1981, a scheduling order, based upon the consent of the parties, was issued by the Clerk of this Court.

However, on August 25, 1981 Mackin filed a petition for a writ of habeas corpus in the district court, 81 Civ. 5259 (S.D.N.Y.), seeking to vacate Magistrate Buchwald's stay, as well as his immediate release from custody. On August 27, 1981, after a hearing upon Mackin's petition, the Honorable Constance Baker Motley denied the writ.

Upon his unsuccessful attempt to terminate these extradition proceedings Mackin refiled a petition for a writ of habeas corpus directly with this Court on August 28, 1981, accompanied by a motion for his immediate release. On September 1, 1981, a panel of this Court (Newman, Kearse, *JJ.;* Eginton, *D.J.*) declined to grant that motion and referred the motion and the petition to the September 8th panel of this Court, which was already scheduled to hear the Government's motion for continuation of a stay pending appeal. On September 8, 1981, a panel of this Court, (Feinberg, Van Graafeiland, and Mansfield, *JJ.*) orally granted the Government's motion for a stay pending an expedited appeal. Mackin's petition for a writ of habeas corpus was consolidated with the Government's pending appeal and petition for a writ of mandamus. On September 14, 1981, Mackin filed an application for bail with Justice Thurgood Marshall of the United States Supreme Court; as of the date of filing of this brief this petition has not been acted upon.

POINT I

This Court Has Jurisdiction.

As of the date this brief was filed, Mackin has not moved to dismiss this appeal, or otherwise challenged this Court's jurisdiction. We recognize, however, that the question of jurisdiction is unsettled, and accordingly we have briefed the issue. In summary, appellate jurisdiction exists under Title 28, United States Code, Section 1291, which gives this Court jurisdiction to hear "appeals from all final decisions of the district courts of the United States." Even if the Magistrate's decision is not appealable, mandamus will clearly lie in this case to correct the lower court's actions.

A. The Process Of Extradition

We begin with a brief overview of the extradition process under the relevant treaty and statutes. Under the Treaty with the United Kingdom, which is similar to most such treaties, extradition proceedings are begun by a request through diplomatic channels, accompanied by a description of the person sought, a statement of the facts of the offense, the text of relevant laws, and a warrant. Art. VII.* Under the Treaty, extradition is then granted

> "if the evidence be found sufficient according to the law of the requested Party . . . to justify the committal for trial of the person sought if the offense of which he is accused had been committed in the territory of the requested Party."

Art. IX. This language has been held to require a finding of probable cause similar to that made at a preliminary examination in a criminal prosecution. *Benson* v. *McMahon,* 127 U.S. 457, 463 (1888); *Sindona* v. *Grant, supra,* 619 F.2d at 175. In addition, the Treaty provides defenses to an extradition proceeding analogous to double jeopardy, *see generally Stowe*

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*In "urgent cases," a suspect may be provisionally arrested and held pending the transmittal of a formal extradition request. Art. VIII. See generally *Caltagirone* v. *Grant,* 629 F.2d 748 (2d Cir. 1980). That procedure was followed in this case.

v. *Devoy*, 588 F. 2d 336 (2d Cir. 1978), and limitations. Art. V (1) (a) and (b). Finally, and of importance to this case, the Treaty provides that extradition is barred if:

> "(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or
>
> "(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character."

Art. V(1)(c).

The procedure for adjudicating extradition petitions is provided by statute. The probable cause determination required as a precedent to extradition by Article IX of the Treaty is made in a judicial proceeding begun by the filing of a complaint and the issuance of a warrant.* 18 U.S.C. §3184.** The

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*This complaint is generally filed by the United States Government on behalf of the requesting government, although formerly the foreign government obtained private counsel to represent it.

**18 U.S.C. § 3184 provides:

> "Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

[Footnote continued on following page]

examining magistrate, who can be "any justice or judge of the United States, or any magistrate authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State," *id.*, holds a hearing under evidentiary rules prescribed by statute. 18 U.S.C. §3190. If he "deems the evidence sufficient to sustain the charge" under the relevant treaty, he so certifies to the Secretary of State, and forwards the proceedings of the hearing with his certificate. 18 U.S.C. §3184. Thereafter, upon requisition from the requesting government, the Secretary of State determines whether extradition shall be granted. 18 U.S.C. §3186; *see Sindona* v. *Grant*, *supra*, 619 F.2d at 174, 176; *Shapiro* v. *Ferrandina*, 478 F.2d 894, 906 & n.11 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). The extraditee can, however, seek review of the examining magistrate's determination by petition for a writ of habeas corpus. *Shapiro* v. *Ferrandina*, *supra*, 478 F.2d at 901. If, on the other hand, the magistrate finds the person sought not subject to extradition, extradition cannot go forward. However, the Government has the right to file a second extradition complaint and begin the process anew. *Collins* v. *Loisel*, 262 U.S. 426 (1923); *Hooker* v. *Klein*, *supra*, 573 F.2d at 1365-66.

B. Jurisdiction Exists Under 28 U.S.C. § 1291.

By a plain and natural reading of the simple terms of the statute, 28 U.S.C. §1291 covers this case and confers jurisdiction in this Court to hear this appeal.* The decision that Mackin was not extraditable was on its face one of a district court: the extradition petition was filed and docketed in the United States District Court for the Southern District of New York;

Legislation has recently been introduced to overhaul the extradition statutes. *See* Amend. No. 2373 to S. 1722, 96th Cong., 2d Sess., submitted Sept. 23, 1980, Cong. Rec. S 13233. Among the provisions embodied in this legislation are explicit recognition of both sides' right to appeal extradition determinations, and clarification that the political offense question is not for the judiciary.

*28 U.S.C. § 1291 provides in relevant part:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

the warrant for Mackin's arrest was signed by a judge of that court and filed in the court; at various times, different judges of the District Court, sitting in Part I, determined matters ancillary to the case in accordance with the Local Rules of the United States District Court for the Southern District of New York; the Magistrate's decision was filed in the District Court. Indeed, the Magistrate, in determining this case upon referral for the District Court under 18 U.S.C. §3184, exercised the power of the District Court. *Grin* v. *Shine*, 187 U.S. 181, 187 (1902). Moreover, her decision was surely "final," since it fully adjudicated the claims of the parties. See p. 22 *infra.** In the face of this logical and normal process, it would require an extraordinary feat of semantic distortion to find that this was not a final decision of a district court and was hence not appealable.

Nonetheless, it has been assumed in several cases that no direct right of appeal exists from the decision of an examining magistrate upon an extradition petition. *Collins* v. *Miller*, 252 U.S. 364, 369 (1920); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714 (1893); *Hooker* v. *Klein, supra*, 573 F.2d at 1364, 1368; *Jhirad* v. *Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976); *Shapiro* v. *Ferrandina, supra*, 478 F.2d at 901; *Jiminez* v. *Aristeguieta*, 290 F.2d 106 (5th Cir. 1961). For example, in *Shapiro* v. *Ferrandina, supra*, this Court stated that "the magistrate's decision is not appealable . . . and review of his decision must be pursued by writ of *habeas corpus*." 478 F.2d at 901. But it bears emphasis that no case has ever actually determined whether the Government has the right to appeal a finding of non-extraditability. Rather, the language in the cited cases was no more than *obiter dictum* pronounced in the course of the court's consideration of quite different issues.** Thus, while these state-

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*In his various attempts to obtain release on bail pending appeal, Mackin has consistently and forcefully maintained that the Magistrate's determination was final.

**In *Collins* v. *Miller, supra*; *Shapiro* v. *Ferrandina, supra*; and *Jhirad* v. *Ferrandina, supra*, the court gave general descriptions of the nature of extradition proceedings by way of background to the specific

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ments are entitled to respect by this Court, they must be considered in the context in which they were made and carefully evaluated when, as now, the precise issue is presented for consideration. *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264, 398 (1821); *United States* v. *Alvarez-Porras,* 643 F.2d 54, 61-62 (2d Cir. 1981). And we respectfully submit that these dicta—which on their face generally relate only to the *extraditee's* right to appeal rather than the Government's—should not be blindly followed here so as to preclude the Government's right to appeal.

First, careful analysis reveals that the dicta regarding the non-appealability of extradition orders have rested either upon other dicta uncritically repeated, or upon an apparent misreading of irrelevant cases. Thus, for example, *Jiminez* v. *Aristeguieta, supra*—the case most often cited for the proposition that no right of appeal exists—relied upon four cases. 290 F.2d at 107 n.4. Two of these had nothing to do with extradition. *Textile Mills Security Corp.* v. *Commissioner,* 314 U.S. 326 (1941); *Todd* v. *United States,* 158 U.S. 278 (1894). A third, *Benson* v. *McMahon, supra,* 127 U.S. at 462-63, merely declares that an extradition hearing is similar in nature to a preliminary hearing in a criminal case but does not discuss appealability. And *In re Oteiza y Cortes,* 136 U.S. 330 (1890), described the appropriate scope of habeas corpus review of a finding of extraditability, not whether a direct appeal can be taken.[*]

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issues presented. In *Hooker* v. *Klein, supra,* the court was asked to decide only whether the Government had the right to file a second extradition petition after one had been rejected on the merits, and whether the first proceeding should be accorded *res judicata* effect. In *Jiminez* v. *Aristeguieta, supra,* the Court dismissed the extraditee's appeal from an interlocutory discovery order. *Fong Yue Ting* v. *United States, supra,* did not even relate to extradition.

[*] Thus, the Court in *Oteiza* said:

> "A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, *in arriving at a decision to hold the accused,* has before him

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Similarly, *Collins* v. *Miller, supra,* 252 U.S. at 369, in asserting that orders in extradition cases could not be appealed, cited *Sternaman* v. *Peck,* 80 F. 883 (2d Cir. 1897)—which also concerned only the scope of habeas corpus in extradition matters. *Collins* also relied upon dictum in *Fong Yue Ting* v. *United States, supra;* that case, in turn, cited *Benson* v. *McMahon, supra,* and *In re Oteiza y Cortes, supra* (which we have already shown say nothing about appealability), and *In re Metzger,* 46 U.S. (5 How.) 176 (1847). But *Metzger* was decided in an entirely different statutory framework, and lends no support to the argument that the Government cannot appeal a finding of non-extraditability.*

> competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused, for the purposes of extradition, such decision of the commissioner cannot be reviewed by a Circuit court or by this court, on *habeas corpus,* either originally or on appeal."

136 U.S. at 334 (emphasis supplied). Obviously, the Court said nothing about the scope of review if the commissioner (or, today, the magistrate) decides *not* to hold the accused. Moreover the Court specifically distinguished *habeas corpus* from a "writ of error"—*i.e.*, an appeal.

*In *Metzger,* the Supreme Court held that it did not have authority to issue a writ of habeas corpus to review the decision of a District Judge holding a fugitive for extradition. But three critical statutory charges since 1847 have eliminated whatever force that antique case has. First, Metzger was decided prior to the enactment of what is now 18 U.S.C. § 3184, and there was thus no statutory basis for a district court to hear the extradition complaint. Since, of course, the lower federal courts have only such jurisdiction as Congress assigns them, the Court in *Metzger* concluded that the judge had not been acting as a "court." 46 U.S. (5 How.) at 191. The enactment of a statute expressly providing authority for the court to hear extradition petitions removes this basis of the decision in *Metzger.*

Second, *Metzger* rested in part upon the fact that the District Judge had acted "in chambers" and not during a term of court. But terms of court have long since been abolished. 28 U.S.C. § 138; *see* 28 U.S.C. §152. Moreover, as we have noted, this case was docketed and processed in the *court.*

Finally, and most significantly, in 1847 the Supreme Court's appellate jurisdiction in criminal cases was extremely limited. *See Ex parte Christy,* 44 U.S. (3 How.) 292, 316 (1845). Since then, however, the

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In short, the supposed rule that extradition findings cannot be appealed has rarely if ever been the subject of careful analysis. It has rested instead upon the reiteration of prior dicta. Given the weak nature of this support, this Court must examine closely the reasons advanced barring a Government appeal in this case to see if they justify ignoring the plain language of Section 1291. On the one hand, it has sometimes been asserted that an extradition proceeding does not take place before a "court" but before an individual "judge" or "magistrate," and thus is not within the scope of §1291's provision for appeal from final decisions of "district courts." *See Shapiro* v. *Ferrandina, supra,* 478 F.2d at 901 n. 3; *Jiminez* v. *Aristeguieta, supra.* On the other hand, it has been argued that a finding of extraditability is not a "final" decision, but a preliminary step "which signals the start, rather than the conclusion, of litigation of the fugitive's guilt or innocence." *Hooker* v. *Klein, supra,* 573 F.2d at 1367-68; *Jhirad* v. *Ferrandina, supra,* 536 F.2d at 482. We submit that the first of these propositions is incorrect and the second inapplicable.

The claim that no appellate jurisdiction exists because an extradition proceeding does not take place in a "court" is based upon an excessively literal reading of 18 U.S.C. §3184.* It is true that the statute provides that an extradition proceeding shall take place before a "justice or judge" or a "magistrate," rather than before a "court." But this semantic nicety does not carry the weight that has been ascribed to it.** For one thing.

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courts of appeals have been created and given general jurisdiction over appeals from district courts. Act of March 3, 1891, ch. 517, 26 Stat. 826.

For all of these reasons, whatever the rule may have been in 1847, *In re Metzger* cannot be relied upon today to establish that there is no Government right to appeal the dismissal of an extradition petition.

*It also relies in part upon *In re Metzger, supra,* which we have shown was based upon a very different statutory framework. *Supra,* p. 19 n. *

**Indeed, appeals from certain matters in extradition proceedings have been accepted by this Court, among others. *E.g., United States* v. *Williams,* 611 F.2d 914 (1st Cir. 1979) (bail); *First National City Bank* v. *Aristiguieta,* 287 F.2d 219 (2d Cir. 1960), *vacated as moot,* 375 U.S. 48 (1963) (discovery).

as the Supreme Court long ago noted, the words "court" and "judge" are often used interchangeably. *The United States, Petitioner*, 194 U.S. 194, 196-97 (1904). Moreover, even when the relevant statute refers to a "judge" rather than to a "court," an appeal is possible. Thus, for example, in *Application of United States*, 563 F.2d 637 (4th Cir. 1977), the Fourth Circuit held it had jurisdiction under 28 U.S.C. §1291 to hear an appeal from an order of a District Judge refusing to issue an electronic surveillance order under 18 U.S.C. §§2510 *et seq*. Despite the fact that the relevant statutes provide that an application for electronic surveillance shall be made, not to a "court," but to a "judge of competent jurisdiction," which is defined to mean "a judge of a United States district court or a United States court of appeals" or a state court judge, 18 U.S.C. §§2510(a), 2518, the court of appeals found that the district judge's order was an appealable final decision of a District Court.

Related to this argument is the suggestion that no appeal is possible because Section 3184 permits an extradition hearing to be conducted by a state court judge, and appealability should not depend upon which court the petition is filed in. *Shapiro* v. *Ferrandina, supra*, 478 F.2d at 901 n.3. But with due respect, this fact is an insufficient basis to eliminate appellate jurisdiction which would otherwise exist. For one thing, wiretapping warrants—the denial of which has been held appealable, as we have noted—can also be obtained from a state judge as well as a federal judge. Similarly, while naturalization proceedings can be had in a state court as well as in a federal court, 8 U.S.C. §1421, the Supreme Court has held that a decision of a federal district court granting or denying naturalization is appealable. *Tutun* v. *United States*, 270 U.S. 568 (1926). The fact is that there are numerous legal proceedings, including many civil suits or indeed, criminal prosecutions, which can be brought in either state or federal court; that is an essential feature of the dual court system in this country. To hold that this concurrent jurisdiction defeats federal appellate jurisdiction of cases properly brought in federal court would carve a massive hole in Section 1291.*

The other argument advanced to negate appellate jurisdiction in extradition cases is that the magistrate's finding of extraditability is not final. Indeed, it is not: it does not in any sense terminate the extradition proceeding, but leads only to the issuance of a certificate to the Secretary of State, who has the power to refuse extradition if he wishes. *Sindona* v. *Grant, supra,* 619 F.2d at 174, 176; *Shapiro* v. *Ferrandina, supra,* 478 F.2d at 906 & n.11. In addition, the extraditee can challenge the extradition order by way of habeas corpus. Thus, the examining magistrate's order is "an interlocutory order." *Hooker* v. *Klein, supra,* 573 F.2d at 1367.

By contrast, an order holding a fugitive non-extraditable completely terminates the extradition proceedings, since the Secretary of State cannot extradite a fugitive without the required certificate. Nor does the Government have any remedy, similar to the extraditee's right to habeas corpus, to attack the examining magistrate's decision directly. And the fact that the Government can file a new petition does not deprive the order in the initial case of finality. *Tutun* v. *United States, supra,* 270 U.S. at 576; *Application of United States, supra,* 563 F.2d at 640-41. Thus, while the lack of finality and the availability of alternate remedies through the Secretary of State or a writ of habeas corpus bar an extraditee from appealing an adverse decision, the same considerations do not preclude a Government appeal in the circumstances of this case.**

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*Nor can it be maintained that an extradition hearing is in some sense not "judicial," so that the judge is not acting as a "court" but as some other unspecified entity. *See, e.g., In re Metzger, supra,* 46 U.S. (5 How.) at 188; *Shapiro* v. *Ferrandina, supra,* 478 F.2d at 906 ("extradition has . . . been generally a matter of judicial competence [which] is particularly suited to the capacities of the judicial branch").

**Such an uneven right to immediate appellate review is not unique. A close parallel exists, for example, in 18 U.S.C. § 3731, which permits the Government to have immediate review of an order dismissing an indictment, although a defendant must generally await the conclusion of the trial.

A persuasive analogy to the instant case exists in the decision of the Fourth Circuit in *Application of the United States, supra*. In that case a district judge refused to issue an electronic surveillance warrant on the ground that surreptitious entry to install the listening device was impermissible without a showing of compelling necessity. *Compare Dalia* v. *United States*, 441 U.S. 238 (1979). Upon the Government's appeal the Court of Appeals found that jurisdiction existed under Section 1291. *Accord, Application of the United States*, 427 F.2d 639 (9th Cir. 1970). The similarity to extradition proceedings is remarkable. Each case involves a special proceeding which by statute is brought before a "judge" rather than a "court." In each case the application can be made before a state judge, and successive applications are permissible. And in each case an order adverse to the Government is final because it is dispositive of the Government's application, although an order granting the application lacks finality. Thus, orders denying extradition as well as orders denying wiretap applications are appealable.

Finally, and importantly, there is no substantial policy reason to deprive the Government of a right to appeal a court's finding of non-extraditability. On the contrary, sound policy and common sense favor the right to appeal. For one thing, an inability to appeal would lead to utterly irrational results. When a decision is rendered adverse to the Government in an extradition petition, it would be barred from obtaining review, no matter how arbitrary and erroneous the lower court's actions, and would be required to commence extradition proceedings all over again in order to obtain a favorable judgment. An eventual judgment that the fugitive was subject to extradition would in all likelihood be challenged by a writ of habeas corpus and subsequent appeals, thus drawing out the extradition process indefinitely.* Moreover, to require the Government to challenge the decision of one district judge or magistrate before another judge or magistrate would be unseemly and could easily lend itself to the appearance of "judge-shopping" in an effort to obtain a favorable tribunal.

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*Thus, permitting this appeal would significantly benefit Mackin. An authoritative appellate decision that he is not subject to extradition would greatly diminish the likelihood that the United Kingdom would insist upon, or that the Government would acquiesce in, refiling extradition papers.

Still more important is the fact that extradition is a sensitive foreign policy matter which often has important implications for our international relations.* For example, as part of her decision in this case the Magistrate made numerous findings concerning discrimination against Catholics in Northern Ireland, the nature of the Provisional Irish Republican Army, and the nature and severity of the conflict in Northern Ireland. One need not disagree with the Magistrate's findings in this respect to recognize that when made by a judicial officer in a formal judicial proceeding they carry a weight that can affect our relations with the United Kingdom and other countries, as well as other similar extradition proceedings.** Congress surely did not intend that these sensitive foreign policy matters be finally determined by a lower federal judicial officer without any possibility of review whatsoever.

In short, neither precedent, nor analysis, nor policy furnishes any reason for departing from the common sense reading of Section 1291. On the contrary, this Court has jurisdiction to hear the Government's appeal from the Magistrate's decision holding that Mackin is not subject to extradition, as a final decision of a District Court.

C. A Writ of Mandamus Will Lie To Correct The Lower Court's Actions.

Even if this Court decides, contrary to our submission, that it lacks jurisdiction to hear the Government's direct appeal from the lower court's decision that Mackin cannot be extradited, nonetheless it should issue a writ of mandamus to correct the lower court's actions. Under 28 U.S.C. §1651 this Court has the power to issue "all writs necessary or appropriate in aid of

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*See also Point II, *infra*.

**Indeed the Magistrate's determination in this case attracted substantial adverse comment from British press and political leaders. *See, e.g.*, London *Sunday Telegraph*, August 16, 1981; Manchester *Guardian*, August 19, 1981; *Daily Mail*, August 15, 1981.

[its] jurisdiction and agreeable to the usages and principles of law." The writ will issue "to confine an inferior court to a lawful exercise of its prescribed jurisdiction," *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25 (1943), or when the case is of "extraordinary significance" presenting an "extreme need for reversal." *In re Attorney General of the United States,* 596 F.2d 58, 63-64 (2d Cir. 1979). And exercise of the power is particularly appropriate when the case involves sensitive foreign policy matters. *Ex parte Peru,* 318 U.S. 578, 586-87 (1943).

Moreover, in determining whether issuance of a peremptory writ is appropriate, "courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction.'" *Will* v. *United States,* 389 U.S. 90, 95 (1967). The writ can issue to protect future appellate jurisdiction as well as present appellate jurisdiction, and "extends to support an ultimate power of review, though it not be directly and immediately involved." *United States* v. *United States District Court,* 334 U.S. 258, 263 (1948); *Roche* v. *Evaporated Milk Assn., supra,* 319 U.S. at 25. For example, where a non-appealable order in a criminal proceeding has the "effect of a dismissal," *Will* v. *United States, supra,* 389 U.S. at 98, immediate review by writ of mandamus is proper, even though the ultimate appellate jurisdiction is entirely speculative because of the possibility of an acquittal. *Id.* at 97-98; *Ex parte United States,* 287 U.S. 241 (1932); *cf. United States* v. *Dooling,* 406 F.2d 192, 198-99 (2d Cir. 1969). Thus, even if this Court lacks jurisdiction to hear a direct appeal, it nonetheless would have had appellate review over the decision of a habeas corpus court reviewing the Magistrate's decision. *E.g., Sindona* v. *Grant, supra; Jhirad* v. *Ferrandina, supra; Shapiro* v. *Ferrandina, supra.* This jurisdiction—which is surely no more remote than the possibility of appellate jurisdiction after a conviction in *Ex parte United States, supra*—has been defeated by the Magistrate's decision barring extradition.

Nor can it be disputed that the questions presented in our appeal and petition are novel and of great significance and delicacy. They relate most intimately to the foreign affairs of the United States. The lower court's decision carries the potential for causing a significant interference in our relations with the United Kingdom. Such a major decision should not take place without any form of review whatsoever. Thus, this is "an extraordinary case" justifying the issuance of a writ of mandamus. *In re Attorney General of the United States, supra*, 596 F.2d at 63; *see Ex parte Peru, supra*. Moreover, as we shall demonstrate in the remainder of this brief, the lower court's decision was clearly in excess of its jurisdiction, because the Magistrate's determination that Mackin's offense was political in character is one properly confided to the executive rather than the judiciary. Thus, this Court should issue a writ of mandamus directing the lower court to vacate its decision and to certify Mackin's extraditability to the Secretary of State.*

POINT II

The "Political Character" Of The Offenses Charged Against Mackin Is A Matter To Be Resolved By The Executive Branch, And Not By The Court.

Under the current extradition treaty between the Governments of the United States and the United Kingdom, a person may not be extradited between the two countries if the offense charged against him is "regarded by the requested Party as one of a political character."** It is the Government's position that the decision whether a charged offense is "political" is vested solely in the Executive Branch, and that Magistrate Buchwald in this case did not have jurisdiction to decide that Mackin's crimes were or were not political. We recognize, of course, that there are a number of reported extradition decisions in which courts have reached the "political offense" issue. *See, e.g., Sindona* v. *Grant, supra; In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); *Ramos* v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); *United States* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). In virtually all of these cases, however, the threshold matter of the court's jurisdiction to decide the issue was neither raised nor discussed. The issue appears to have been left open by the Supreme Court in an early case, *see Ornelas* v. *Ruiz*, 161 U.S. 502, 512 (1894) (discussed *infra* at p. 38), and the only modern judicial discussion is that of the Seventh Circuit in *Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981), *pet'n for cert. pending*, Dkt. No. 81-83. In *Abu Eain*, the Seventh Circuit found considerable merit in the Government's position, but held that any "overhauling" of the extradition process was a matter for Congress to consider, rather than the courts. 641 F.2d at 517. For the reasons which follow, we do not believe that this is so. On the contrary, we show that the vesting of exclusive jurisdiction to decide the "political offense" question in the Executive Branch does not do violence to the present extradition statutes or to the Treaty under which this case was decided, and is in keeping with the deference the courts have traditionally and wisely paid the Executive Branch in matters of foreign policy.

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*Moreover, we have asserted the invalidity of the Magistrate's order as a defense to Mackin's petition for a writ of habeas corpus in this Court and have counterclaimed seeking a direction that she vacate her order. Accordingly, Mackin's petition for a writ of habeas corpus will require a determination of the same issues as the merits of this appeal, since Mackin's confinement is surely not illegal if, in fact, the Magistrate's decision was wrong and he is, in fact, extraditable.

**The full language of the Treaty on this point is set forth at p. 27, *infra*.

The appropriate starting point for analysis is the language of the Treaty and of Title 18, United States Code, Section 3184, the statute that sets forth the procedures to be followed in international extradition cases. Article V of the Treaty provides, in pertinent part, as follows:

> "(1) Extradition shall not be granted if:
>
> * * *
>
> "(c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character; or
>
> "(ii) the person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character."

There is nothing in this language to suggest, even implicitly, that the political character of a particular offense is to be judicially determined. If anything, the provision that the determination is to be made "by the requested Party" seems to refer to the Government of the United States. Thus, the parties to the Treaty, according to its preamble, are the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland. Moreover, there are numerous other references in the Treaty to the "Parties" and to the "requested Party" in particular which make sense only if they refer to the Governments of the two countries. For instance, Article XIV(1) of the Treaty states that "[t]he requested Party shall make all necessary arrangements for and meet the cost of the representation of the requesting Party in any proceedings arising out of a request for extradition." Obviously, the reference to the "requested Party" in this provision is to the United States Government, rather than to the courts. Likewise, the provision in Article XI(1) that "[t]he requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition" can refer only to the Government (*i.e.*, the State Department), and not to the committing magistrate.*

Similarly, there is nothing in the language of the pertinent statute, 18 U.S.C. §3184, to indicate that the "political offense" issue should be decided by the committing magistrate. The statute does not refer explicitly to political offenses, but pro-

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*Similarly, references to the "requested Party" in other American extradition treaties have been held to refer to the Executive Branch. In *Berenguer* v. *Vance*, 473 F. Supp. 1195 (D.D.C. 1979), the court construed a treaty provision which barred prosecution and punishment of the extraditee for an offense other than that for which extradition had been granted unless such prosecution and punishment had been consented to by the "requested party." The court held that the "consent" to which the treaty referred was that of the Executive Branch, rather than the judiciary. 473 F. Supp. at 1197-99.

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vides generally that the extraditee be brought before the committing justice, judge, or magistrate "to the end that the evidence of criminality may be heard and considered."[*] If anything, the phrase "evidence of criminality" refers solely to the issue of probable cause. A number of courts, without referring specifically to the "political offense" issue, have construed the language of 18 U.S.C. §3184 (and the predecessor statute, Section 5270 of the Revised Statutes) as requiring the committing magistrate to decide only the issue of probable cause. For instance, in *Bryant* v. *United States*, 167 U.S. 104 (1897), the Supreme Court construed the identical language as now appears in 18 U.S.C. §3184 to grant to the magistrate jurisdiction to determine simply whether there was probable cause to believe the fugitive guilty of the crime charged and whether the crime charged was enumerated in the pertinent treaty. 167 U.S. at 105. In *Charlton* v. *Kelly*, 229 U.S. 447 (1913), the Court likewise construed the language now contained in 18 U.S.C. §3184 to authorize the committing magistrate to conduct only a limited hearing "of the character of those preliminary examinations, which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused . . . to ultimately answer to an indictment or other proceeding, in which he shall be finally tried upon the charge made against him." 229 U.S. at 460. The Court took note of Congress' restrictive and limited grant of

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It is also of some significance that the language "regarded by the requested Party" represents a change from the treaty language construed in earlier cases. The treaty language construed in cases such as *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); *Ramos* v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); *United States* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); and *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894), barred extradition for any "crime or offense of a political character." The Treaty at issue in this case, however, abandons this objective language and calls for the subjective opinion of the "requested Party," which we submit refers to the Secretary of State.

[*] The full text of 18 U.S.C. §3184 appears at p. 15 n.**, *supra*.

jurisdiction and held that, once the examining magistrate deemed the evidence of criminality sufficient to hold the accused for extradition, his task was completed. 229 U.S. at 461-62. *See also, e.g., Collins* v. *Loisel,* 259 U.S. 309 (1922); *Berenguer* v. *Vance, supra,* 473 F. Supp. at 1199 ("While the judiciary has been given a uniquely important role to play in the American extradition process, that role is limited to the making of a determination of probable cause.").

In light of the failure of either the Treaty or the statute explicitly to vest the courts with jurisdiction to decide the "political offense" question, we believe that that question is properly to be decided by the Executive Branch. It is, of course, a basic tenet of American jurisprudence that the conduct of our nation's international affairs should be left to the President and the Secretary of State. Extradition, in particular, has always been recognized as a matter closely intertwined with our foreign policy. Thus, as the court recognized in *Berenguer* v. *Vance, supra,* "[t]he very fact that extradition is accomplished under treaty indicates that it is most properly considered to be part of the foreign affairs responsibility of the President." 473 F. Supp. at 1199.

The foreign affairs implications of extradition cases are particularly important and sensitive when there is a question as to the applicability of the "political offense" exception contained in almost all extradition treaties. Indeed, a recent report of the Senate Judiciary Committee on proposed amendments to the extradition statutes* commented that "a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United States efforts to combat international terrorism." Senate Comm. on the Judiciary, 96th Cong., 2d Sess., Report on Amend. 2327 to S.

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*See p. 15 n.** *supra.*

1772, Cong. Record S 13233 (1980).* The potential for international embarrassment from judicial decisions on the "political offense" exception flows not only from the results of those decisions, but from the very process of decision-making and from the discussion of the political climate in the requesting nation that may accompany the decision. This case is a perfect example. In ruling on the "political offense" question, Magistrate Buchwald found it necessary to go far beyond the facts supporting the extradition request and to receive evidence bearing on the history of English-Irish relations, the level of violence in Northern Ireland, the British legal and military response to the efforts of the IRA, the position of the Government of the United Kingdom with regard to the European Convention on Human Rights, and a broad range of other matters. The hearings on this issue covered seven days and consumed 1200 pages of transcript, without regard to the voluminous exhibits that were submitted. The opinion of the Magistrate covers an equally broad expanse; one may find within it a discussion of the political and historical heritage of Northern Ireland, a treatment of the religious underpinnings of the historical and current disturbances there, passing references to supposed abuses by various authorities, a lengthy discussion of the general level of violence in Northern Ireland, allusions to

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*In order to illustrate this point, the Judiciary Committee Report took explicit note of *In re McMullen*, No. 3-78-1099 MG (N.D. Cal. May 11, 1979), an extradition decision by a federal magistrate in San Francisco which barred the extradition to the United Kingdom of an IRA bomber who had blown up an English army barracks. According to the Report, the *McMullen* decision (which was based on the "political offense" exception) was "a considerable setback for United States efforts to control international terrorism, and could make the United States a more attractive refuge for members of the IRA, the PLO, the Beider-Meinhoff gang, the Italian Red Brigade and other terrorists." Committee Report, *supra*, at n. 62. The Magistrate's decision in this case, in our view, only compounds the adverse effects of the *McMullen* decision, with additional adverse effects on the relationship between the Governments of the United States and the United Kingdom. See p. 24 n.** *supra*.

British legal procedures for the prosecution of suspected terrorists, an assessment of the support for IRA activities within the Catholic community at large, and a host of related topics. Although doubtless issued in good faith, the opinion is plainly susceptible to misinterpretation and to political uses which may be contrary to this country's foreign policy. Indeed, we have already been advised that the opinion has been widely circulated in Northern Ireland on behalf of "hunger strikers" in British custody who seek to be recognized and treated as "political" offenders.

In *Abu Eain* v. *Wilkes, supra,* the Seventh Circuit dismissed the Government's argument about judicial interference with foreign policy with the assumption that the "political offense" issue could be decided like any other straightforward factual issue, without involving the judiciary in an in-depth evaluation of the operations of a government with which this country has an on-going formal relationship. Indeed, the Court in *Abu Eain* stated that in order to resolve a "political offense" question, "the magistrate need look only to the facts supporting the extradition request for evidence as to whether or not violent political activity was unfolding at the time to which the facts relate, and of the individual's recognizable connection to that violence." 641 F.2d at 516. As this case demonstrates, resolution of the issue may not always be so simple in the eyes of the judge making the decision. The Magistrate in this case found it necessary—over the Government's objection—to go far beyond the facts supporting the extradition request and to hear evidence and make findings on virtually every aspect of the political situation in Northern Ireland, to the potential detriment of our country's foreign policy.

The decision in this case also reflects that, contrary to the Seventh Circuit's assumption in *Abu Eain,** an extradition

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*The Court in *Abu Eain* asserted that, "[w]hen considering the

[Footnote continued on next page]

court may indeed perceive it necessary to determine whether violence in a foreign country has reached a particular level. In other contexts the courts have recognized that this question is particularly ill-suited to judicial determination, and that only the Executive Branch has the means and the authority to determine the political conditions which exist on foreign soil, including whether or not a state of war, belligerency, or insurrection exists as of a certain date. *See In re Cooper*, 143 U.S. 472, 499 (1892); *The Three Friends*, 166 U.S. 1, 63-66 (1897); *Underhill* v. *Hernandez*, 168 U.S. 250, 253 (1897).*

For example, in *The Three Friends, supra*, the Supreme Court held that the judiciary may not independently determine whether an alleged political struggle in a foreign land has reached a certain magnitude such that a state of war, belligerency, or conflict of arms should be recognized.** Such

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political offense exception, a court need consider only whether some incidents of political violence have occurred, and not whether the violence has risen to a particular level." 641 F.2d at 514 n.14. Obviously, this case demonstrates otherwise. The court below undertook a lengthy study of the level of violence in Northern Ireland. (Op. 56-67).

*These decisions are consistent with numerous other Supreme Court cases which have held that only the Executive Branch can determine to what sovereignty an island or country belongs, *Williams* v. *Suffolk Insurance Co.*, 34 U.S. (13 Pet.) 414, 420 (1839); what the proper boundaries are of a foreign nation, *Foster & Elam* v. *Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829); the beginning and termination dates of a civil rebellion in a foreign country, *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871), and the length of military occupation of a foreign country, *Neeley* v. *Henkel*, 180 U.S. 109, 124 (1901).

***The Three Friends* involved a forfeiture under federal statute of the vessel "The Three Friends" on the ground that the vessel had been armed and outfitted for the purpose of serving a revolutionary group engaged in armed resistance to the then existing governing body in Cuba, the Government of the King of Spain. The key issue was whether there existed a "state of belligerency" in Cuba. The Court held that only the political departments can determine the various states of political unrest in a foreign country, including "belligerency."

decisions are exclusively the prerogative of the "political department" of the government. *See Underhill* v. *Hernandez, supra; Gelston* v. *Hoyt,* 16 U.S. (3 Wheat.) 246, 324 (1818).

The reasons why only the Executive Branch can speak to the issue of civil strife in a foreign land are several. First, only the Executive Branch has a network of intelligence sources who can provide complete, accurate, and up-to-date information on the political situation in a foreign land:

> "He [the President] has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary and the premature disclosure of it productive of harmful results." *United States* v. *Curtiss-Wright Corp.,* 299 U.S. 304, 320 (1936).

Secondly, and perhaps of greater importance, a judicial setting is simply not a proper forum for a debate over the political climate in a foreign country. The Supreme Court recognized as much in *Chicago & Southern Air Lines* v. *Waterman Corp.,* 333 U.S. 103, 111 (1948). There, the Court stated:

> "But even if courts could require full disclosure [of foreign intelligence reports] the very nature of executive decisions as to foreign policy is political not judicial. Such decisions are wholly confided by our Constitution to the political departments of the governments, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or injury."

Finally, and as this case once again illustrates, there are no judicially manageable standards for determining when an offense is of a "political character," and whether violence abroad has reached a particular level. As Professor Garcia-Mora has observed,

> ". . . the very term "political offense" is seldom, if ever, defined . . . this may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature it eludes a precise definition. . . .
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> ". . . [N]o uniform criterion exists in regards to this concept [political offense] so wholly related to the protection of human rights. There is therefore no fundamental agreement among governments and domestic tribunals as to precisely what constitutes a political offense. . . ."

Garcia-Mora, *The Nature of Political Offenses,* 48 Va. L. Rev. 1226-27 (1962). Here, the court below felt it necessary to undertake a lengthy study of the historical, political, military, religious, and sociological aspects of the dispute in Northern Ireland in order to resolve the issue. Such matters do not fall within the expertise of lawyers and judges, and are better left to the political branches of government.

Significantly, there is no dispute but that the Executive Branch is the appropriate forum for the resolution of the other aspect of the "political offense" issue—whether the request for extradition has been made with a view to punish the extraditee for an offense of a political character. Treaty, Article V(1) (c) (ii). The Magistrate recognized that this issue was within the exclusive province of the Secretary of State (Op. 39), as did the Seventh Circuit in *Abu Eain* v. *Wilkes, supra,* 641 F.2d at 516-17. *See, e.g., In re Lincoln,* 228 F. 70, 73-74 (E.D.N.Y. 1915), *aff'd per curiam,* 241 U.S. 651 (1916); *Garcia-Guillern* v. *United States,* 450 F.2d 1189, 1192 (5th Cir. 1971); *In re Gonzalez, supra,* 217 F. Supp. at 722. The courts' refusal to inquire into the motivations of a foreign government's extradition request has its roots in the "political question" doctrine and in the deference the courts have wisely shown the Executive Branch in matters of foreign policy. However, as we have shown, the same concerns dictate that the courts also yield to the Executive Branch with regard to the aspect of the "political offense" issue involved in this case. Moreover, there is absolutely nothing in the structure or language of the Treaty or of the extradition statute to indicate that one aspect of the political offense issue should be handled exclusively by the Secretary of State while the other should be resolved initially and perhaps finally by the courts.*

In short, the heretofore routine assumption by the courts that they should decide whether charged offenses are of a political character has created a significant anomaly in the law of extradition. In virtually all other respects, the courts have recognized the limited nature of their jurisdiction in extradition proceedings, and have been careful to avoid interference with the political branches' conduct of the country's international affairs. Indeed, this Court only recently reiterated a policy against "protracted extraditability hearings," and noted that "[s]uch hearings have been held to have limited scope, both as to the type of defenses which may be raised and the type of evidence which may be received." *Hu Yau-Leung* v. *Soscia,* 649 F.2d 914, 919 (2d Cir. 1981). Yet, the court below assumed jurisdiction of the "political offense" issue, conducted a hearing that spanned many months, and rendered a lengthy exposition of the situation in Northern Ireland that has already generated public protest abroad and has provoked the suggestion in a British newspaper that "American disregard for British sus-

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*It is no answer to suggest, as did the Court in *Abu Eain* v. *Wilkes, supra,* that the magistrate's legal determination as to the "political offense" issue does not bind or control the Secretary's later political conclusion. 641 F.2d at 516. While the Secretary gets a chance to resolve the issue if the magistrate finds the accused to be extraditable, the Secretary will never pass on the issue if the magistrate finds otherwise. Obviously, and as this case itself indicates, the political and foreign policy ramifications of extradition decisions exist when extradition is denied as well as when it is authorized.

ceptibilities cannot fail to damage the alliance."* Moreover, the problems that inhere in the Magistrate's approach promise to multiply with time. As the Attorney General noted last year, extradition requests have multiplied from a rate of approximately twenty per year in the late 1960's and early 1970's to a rate of over 250 per year.** These requests come at a time when international terrorism has become almost commonplace and at a time when the strain on judicial resources is increasing as well. In these circumstances, it makes even less sense for the courts to continue to involve themselves in questions that should properly be swiftly resolved by the Secretary of State.

As we have shown, the Magistrate's assumption of jurisdiction to decide the "political offense" issue was not mandated by the language of the statute or the Treaty, and is out of keeping with the deference traditionally paid the President and the Secretary of State in their conduct of foreign affairs. The only support for the Magistrate's decision comes from the fact that other courts have routinely treated the issue as one they might properly decide. In fact, however, despite the number of decisions which purport to decide "political offense" questions, the authority is not so clear as it would seem. As the Magistrate's opinion indicates, the American treatment of the "political offense" question stems from the opinion of Justice Denman in *In re Castioni,* [1891] 1 Q.B. 149. (Op. 22-27). However, in *Castioni* itself there was no need to consider the jurisdictional issue, for that case was decided under the British Extradition Act of 1870, which provided a defense to any person who could "prove to the satisfaction of the . . . *magistrate or the Court before whom he is brought on habeas corpus,* or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character." 33 & 34 Vict., c. 52, §3(1). *See* Op. at 24

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*London *Sunday Telegraph,* August 14, 1981, at 14.

**Letter from Benjamin Civiletti to Hon. Edward M. Kennedy, July 1, 1980, reprinted in Cong. Rec S 13235 (September 23, 1980).

& n. *. Since *Castioni* was decided on habeas, the basis for the court's jurisdiction appeared explicitly in the statute.*

Following *Castioni,* the only significant discussion of the Circuit in *Abu Eain* v. *Wilkes, supra,* was the opinion of the California District Court in *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894). *Ezeta,* however, an opinion decided in 1894, confined itself to a discussion of the treaties and statutes then in force, and could not possibly have taken into account the effect of unnecessary judicial decisions on the conduct of this country's modern and complicated international affairs. Moreover, we note that the jurisdictional issue was left unresolved by the Supreme Court in *Ornelas* v. *Ruiz, supra.* That case arose on habeas after a commissioner had found sufficient evidence to warrant the extradition to Mexico of three persons who had been part of a large band which had attacked forty Mexican soldiers and terrorized a Mexican town. Thereafter, a district judge had concluded on habeas that extradition was barred under the "political offense" exception. The Supreme Court reversed. While the opinion has a discussion on the merits of the political offense exception, the Court explicitly refused to address the contention "that the right of the executive authority to determine when offences charged are or are not purely political is exclusive. . . ." 161 U.S. at 512. Since then, the courts appear simply to have assumed without discussion that it was their province to decide whether given offenses were political in nature.** We respectfully submit that the mere existence of these cases, decided without any attempt to resolve the jurisdictional dispute presented in this case, are simply not a sufficient basis for the courts to continue to involve themselves in sensitive matters of foreign policy in a world in which international relationships have assumed increasing importance and vastly increasing complexity.

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*Interestingly, the statute appears to contemplate that a court would have jurisdiction to decide the issue only on habeas, but that the Secretary of State would decide the "political offense" question in the first instance. We put forth no view about the jurisdiction of an American habeas court to consider the issue.

**In almost all of these cases the committing magistrate and the habeas court concluded that the offenses in question were not political. This being so, it is not surprising that the requesting countries did not raise the jurisdictional issue.

POINT III

The Lower Court Erred In Finding That Mackin's Crimes Were Political Offenses Under The Treaty.

Assuming *arguendo* that the judiciary has the power to determine the applicability of the political offense exception contained in Article V of the Treaty, we nevertheless submit that the Magistrate erred in finding that Mackin had satisfied his burden of establishing that his crimes were political offenses within the meaning of the Treaty.* As we shall demonstrate, her decision was wrong on the facts that were presented to her, and would, if followed, have the effect of creating a "safe haven" for terrorists in the United States.

As we have noted, *supra* p. 11, the Magistrate found that Mackin's offense was a "relative" political offense. See Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists,* 71 J. Crim. L. & Criminology 193, 200 (1980). The accepted definition of a relative political offense is found in *In re Castioni,* [1891] 1 Q.B. 149, 156:

> "[I]t must at least be shown that the act is done in furtherance of, done with the intention of assistance, as sort of overt act in the course of acting in a political matter, a

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*The Magistrate held that the potential extraditee has the burden of establishing that he falls within the political offense exception by a preponderance of the evidence. This evidentiary burden is properly placed upon the fugitive because the political offense exception is in the nature of an affirmative defense and because placing the burden upon the Government would require it to "disprove all possible political connections" — an impossible task.

> political rising, or a dispute between two parties in the State, as to which is to have the government in its hands. . . .
>
> "The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."

See Sindona v. *Grant, supra,* 619 F.2d at 173, and cases cited therein; *In re Ezeta, supra,* 62 F. at 997-1002. To determine whether Mackin's crimes fell within this standard, the Magistrate applied a three-pronged test, requiring Mackin to establish the existence of a political disturbance, his membership in one of the contesting parties, and the relationship of his crimes to the political disturbance. See p. 11 *supra.* While we have no quarrel with the appropriateness of this standard in general, in attempting to apply it the Magistrate conducted, in effect, a full scale trial on the underlying offense, as well as a public hearing upon the internal social and political structure of the United Kingdom. However useful this may have been as a public forum for the PIRA, this hearing went far beyond the "limited scope" of an extradition hearing, *Hu Yau-Leung* v. *Soscia, supra,* 649 F.2d at 919, and invaded areas of political concern which are solely within the jurisdiction of the Executive Branch. *Sindona* v. *Grant, supra,* 619 F.2d at 174; *Peroff* v. *Hylton,* 542 F.2d 1247, 1249 (4th Cir..), *cert. denied,* 364 U.S. 851 (1960); *Gallina* v. *Fraser,* 177 F. Supp. 856 (D.Conn.), *aff'd,* 278 F.2d 77 (2d Cir.), *cert. denied,* 364 U.S. 851 (1960). See Point II, *supra.* And entirely apart from the unwarranted scope of the hearing Mackin failed to establish that he fell within the political exception even under the three-pronged test applied by the Magistrate.

First, the proof before the lower court did not establish that there was a war, revolution or rebellion sufficient to satisfy the first prong of the political offense exception. The Magistrate relied primarily upon statistics relating to the incidence of violence in Northern Ireland and upon the law enforcement measures taken by the Government of the United Kingdom to counteract that violence. (Op. 83-84). Unquestionably there has been a significant level of violent terrorist activity in Northern Ireland; unquestionably the British Government has been required to take firm steps to control it. (GX 16, MX S). But the statistics relied upon by the Magistrate (Op. 66), when analyzed, demonstrate two salient features: the declining level of violence and the nature of the terrorist acts.

Clearly, for the political offense doctrine to apply, the underlying political disturbance must be more than a few isolated acts of violence, and must occur at the time and place of the crime for which extradition is sought. Thus, Mackin had the burden of establishing that a war, revolution, rebellion, or other political uprising existed in Belfast in 1978, not that some lesser disturbance existed or that an uprising occurred at some other place and time. The record established, however, that PIRA terrorist activity peaked in 1972, shortly after internment without trial was introduced, and was steadily declining on into 1978. (Tr. 1243-60; MX U). This is reflected in both a decreasing number of terrorist incidents and in a decreasing number of fatalities resulting from those incidents. (Op. 66). And the Magistrate herself relied upon testimony establishing that the PIRA consisted of no more than several hundred dedicated persons. (Op. 79, 80; Tr. 506-12, 524, 1344). Given these facts alone, we submit that the Magistrate erred in finding that the terrorist violence in Belfast rose to a level sufficient to warrant comparison to, for example, Castro's overthrow of Battista. See *Ramos* v. *Diaz, supra*.

More fundamentally, the nature of the campaign of terrorist violence conducted by the PIRA precludes its characterization as a political disturbance of the type which forms the basis for the political offense exception. The evidence graphically demonstrated that the bulk of the victims of terrorist violence in Northern Ireland are civilians, rather than police or military personnel.* (Op. 66; Tr. 1249). The vast majority of the population takes no part in these violent activities, except occasionally in their role as innocent victim.** (Tr. 516-20). The PIRA seeks to overthrow the existing Government not by attacking it directly, but by creating a climate of fear and destabilizing the community's social structure. (Tr. 514-19, 1345). Thus, while the ultimate goal of the PIRA may be said to be "political"—as opposed to economic or personal—the means chosen do not fit within the political offense exception.

This sort of activity has long been held not subject to the protection of the political offense exception. In *In re Meunier*, [1894] 2 Q.B. 415, a seminal British case, an anarchist sought to prevent his extradition to France to face charges of bombing a cafe and military barracks. The court rejected the claim that the offense was political, because Meunier's crimes were "directed primarily against the general body of citizens" rather than against the Government. *Id.* at 419. More recently in *Abu Eain* v. *Wilkes, supra,* the Seventh Circuit discussed this aspect of the political offense doctrine at length:

> "Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past.
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> "For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure

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*For example, of the 737 persons killed in terror-related incidents in Northern Ireland between 1975 and 1978, 580 were civilians. (Op. 66).

**One stark, but typical incident occurred when a PIRA bomb exploded in a hotel, killing 12 civilians. (Tr. 514-15).

as an incident of the expulsion of a certain population from the country, and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere."

We submit that the reasoning of *Abu Eain* and *In re Meunier* applies with equal force to this case. Terrorist activity should not be rewarded by permitting terrorists asylum in this country or by foregoing our treaty obligations.

The second critical error made by the lower court was its finding that Mackin's crime was incident to and in furtherance of the political uprising which it found to exist.* The Magistrate's opinion on this point is somewhat inconsistent. For example, while stating that she found it unnecessary to resolve the conflicting stories of Mackin and the four soldiers (Op. 92, 95), the Magistrate clearly accepted Mackin's uncorroborated version of the events of March 16 and rejected the soldiers' version in several respects, most notably the manner in which the confrontation began.* Indeed, the conflict between Mackin's testimony and that proffered in support of the extradition request emphasizes the need to remit the question of whether an offense is political to the Executive. The United Kingdom in this case was faced with the choice of letting Mackin's version of the offense go unchallenged by live testimony, and risking its acceptance *in toto*, or of putting on its entire case in the extradition proceeding to contradict Mackin. But this latter alternative is supposedly beyond the scope of extradition proceedings. *See Matter of Sindona*, 450 F. Supp. 672, 685 (S.D. N.Y. 1978).

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*We accept the Magistrate's determination that Mackin was a member of the PIRA.

Even taking Mackin's story at face value, however, he has failed to establish that his offense was incidental to any political uprising. According to Mackin, he and Gamble set out on the morning of March 16, 1978, not with any political goal in mind, but to try to find a stolen taxi. Mackin testified that when he saw "strangers" he was afraid they might try to follow him to a "safe house" (Tr. 820-21) and that he tried to get away from them.** Mackin claimed that as he approached Wooton, Wooton "spun around with a gun in his hand," and he and Gamble then attacked the soldier. (Tr. 825). When Wooton began firing and hit Gamble, Mackin ran as "a matter of pure survival." (Tr. 826). Mackin claimed he was unarmed. (Tr. 824).

It is apparent that the incident as described by Mackin had no political content whatsoever. He was engaged on a non-political errand that morning; he sought to avoid all confrontation with the soldiers; he did not initiate any assault on them; he was unarmed; he fled when the firing began. Thus, the record does not establish that the assault by Mackin on Wooton was in furtherance of any political purpose. Mackin's claim reduces to an assertion that any violent confrontation between a member of the PIRA and a British soldier, whatever be the circumstances, is of necessity political in nature. But this is not the law. On the contrary, as was said in *In re Castioni, supra* at 156, it must be shown that the crime was "done with the intention of assistance, as a sort of overt act in the course of acting in a political matter."*

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*Thus, although Wooton said in his statement that he did not draw his gun until after Mackin appeared to prepare to draw a weapon, and that he did not fire until after Gamble attacked him (Cmplt. 10-17), the Magistrate found that Wooton fired first and made no reference to any threatening actions by Mackin or Gamble. (Op. 94-95).

**In Mackin's own words, "So our intention, really was to escape from the—what was becoming a circle around us, and we decided to cut up the back of Rossnareen and out onto the main artery, which is Glen Road, where there is constant traffic, you know, where the peoples' taxi operates and we can get away." (Tr. 822; see also Tr. 1164-67).

For example, if Mackin had just robbed a bank and shot a British soldier who was trying to apprehend him, no one would seriously entertain the claim that his offense was political simply because he was a member of the PIRA. Or—to take a state of facts closer to those put forth by Mackin himself—if he had been walking down the street alone and had defended himself against an unprovoked assault, only to discover that his assailant was a British soldier who arrested him, Mackin's PIRA membership would surely not transform this everyday scuffle into a political offense. The fundamental error made by the Magistrate is her confusion of the political offense with the political offender. Mackin's membership in a terrorist organization simply cannot convert every confrontation he has with the officers of the law into a political act for which extradition is barred. Rather, he has the burden of showing that the specific act itself was in furtherance of the political conflict. And it is that burden that Mackin failed to meet.

The mischief of the Magistrate's holding is apparent by a consideration of its application to some other contexts. For example, a member of the Puerto Rican FALN who bombed an

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**Compare In re McMullen*, Dkt. No. 3-78-1099 MG (N.D. Cal. 1979), holding a PIRA member not extraditable for a premeditated bomb attack on a British Army barracks in England which the court found was shown by the evidence to have been "directed by persons in authority in the PIRA." *Id.*, slip op. at 6.

American military reservation and fled to England would effectively be free from extradition if the United Kingdom were to follow the decision below, merely by establishing a continuing conflict in Puerto Rico, his membership in the FALN, and the identity of his victims as representatives of the American government. The same would be true of a member of the Palestinian Liberation Organization or any one of a number of other small, dedicated cadres devoted to anarchy and terrorism. Moreover, many other common criminals would likely secure shelter within the haven of the lower court's analysis. For example, a Palestinian or Puerto Rican who assaulted a policeman while attempting to flee the scene of a burglary could come into court and assert that he was a member of the PLO or FALN, and that attacks on policemen were "part and parcel" of his terrorist activities (Tr. 1162-63), thus precluding his extradition. In short, despite the lower court's professed concern, its opinion, if followed, would have the seriously undesirable effect of making the United States a safe haven for terrorists from which they could not be extradited. It would also produce the anomalous result that "isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval." *Abu Eain* v. *Wilkes, supra,* 641 F.2d at 521.

For all of these reasons, the Magistrate's determination that Mackin's offense was political was erroneous.

CONCLUSION

The order of the court below should be vacated and the case remanded with instructions to certify Mackin's extraditability to the Secretary of State.

Respectfully submitted,

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United States District Court, Northern District of California

(Magistrate No. 3-78-1899 MG)

IN THE MATTER OF THE EXTRADITION OF PETER GABRIEL JOHN MCMULLEN

MEMORANDUM DECISION

Having denied extradition of Peter Gabriel John McMullen by an oral order made at the conclusion of argument on May 9, 1979, and having dismissed the extradition proceeding against Mr. McMullen, the Court is taking this means of setting forth in detail the facts and legal authorities which lead to our ruling that the defendant came within the political offense exclusion provided in Article V, 1 C (i) and (ii) of the extradition treaty between the United States and Great Britain.

At the outset, it must be stated that in ruling, we make no finding that the defendant would not be subject to extradition because of Treaty Article V, 2, which in this case, is the possibility of physical or mental mistreatment the defendant could suffer should he be incarcerated in a British prison in either England or Northern Ireland.

The government concedes that should the facts meet the requirements of the political offense in the treaty provisions, it is mandatory that the Court deny extradition.

This has been a unique extradition proceeding. It cannot be characterized as the usual type of extradition normally which has its source in either a bank embezzlement, robbery, extortion, fraud or murder, all absent political overtones.

The background of this litigation could relate back to the early turn of this century and at least to the year 1921 when the conflict between the Irish people and Great Britain was partially resolved with the creation of the Republic of Ireland. Sporadically since 1921 and particularly in the decade commencing in 1970 the conflict, political and nationalistic in concept and objective has flared and erupted between certain groups in Northern Ireland and Her Majesty's government. Not all the Ulster inhabitants seek freedom from British rule and unification with the Irish Free State. One organization within and without the borders of Northern Ireland has continued to press and to this day continues to fight for Northern Ireland's independence from British rule. This is the Provisional Irish Republican Army (PIRA) which has since 1970, engaged in various sorts of terrorist or guerrilla activities, covert in execution in its quest for nationalization of Northern Ireland.

The standards that must be established to bring what otherwise would be common law crime (e.g., murder) within the political offense exception of the treaty are twofold. One, the act must have occurred during an uprising and the accused must be a member of the group participating in the uprising. Second, the accused must be a person engaged in acts of political violence with a political end. Although these are not the verbatim standards set out in the British decision of In re *Castioni*, 1 QB, 148 (1891), they are, in essence, what is required to be proved by the accused in order to avoid extradition, where this treaty exception is asserted by way of defense. *In re Castioni, supra,* was cited by the Ninth Circuit in 1957 in its decision of *Karadzole* v. *Artukovic,* 247 F.2d 198 in affirming a District Court decision denying extradition involving a World War II war crime. In *Artukovic,* the Ninth Circuit speaking through Circuit Judge Stevens acknowledged that American courts have more or less adopted the standards of *Castioni* in political offense cases (pg. 203). The treaty provides the political character of an otherwise criminal offense for which extradition is sought must be so regarded or determined as such by the requested party, in this instance, the United States of America. We do not look to the Executive arm of the Government, particularly the State Department, for a determination as what this government considers as an act of political offense relative to criminal activity occurring on the soil of a foreign nation. Extradition is a judicial proceeding. The decisional law of the courts of the United States is the source in answering this question: "What is a crime of a political character"? The language in *Artukovic* is of assistance when it quotes *Castioni* as to what is a politically motivated crime. The political offense crime must be incidental to or formed as a part of a political disturbance and committed as furthering a political uprising. Even though the offense be deplorable and heinous, the criminal actor will be excluded from deportation if the crime is committed under these pre-requisites.

Was there in 1974 a disturbance in Northern Ireland that meets the first of these steps? In executing a derogation with respect to the International Covenant in Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (Government Exhibit 4c) and (RT 10) the British government recognizes there existed a "public emergency" as defined in the Covenant due to violent civil disturbance or disruption concerning the United Kingdom's conduct of its affairs in Northern Ireland. The record in this case shows that highly placed officials in the British government made direct admissions that an insurrection was occurring in Northern Ireland in 1970 and 1974.

Aside from these admissions by the British government of a public emergency or an insurrection existing in Northern Ireland, we cannot shut our eyes as to what has occurred in Northern Ireland since 1970 through 1979 with respect to the activities of PIRA in its insurgent and terrorist activities, seeking independence for the six counties that comprise Northern Ireland (Ulster). The PIRA's terrorist/guerrilla activities were not and are not confined to these six counties, but extend to Great Britain. This, together with the presence of British troops in Northern Ireland since 1972, and the termination of Home Rule, leads the Court to the obvious inescapable conclusion that an insurrection and a disruptive uprising of a political nature did, in fact, exist in Northern Ireland in 1970 and particularly in 1974, when Mr. McMullen is charged with the crimes against Claro Barracks, a British Army installation. We find this necessary atmosphere or condition existed as one of the steps necessary in the application of the political exception defense. *In re Ezota*, 69 F.2d 972; *Ramos* v. *Diaz*, 179 F.Supp. 454.

The government attempts to brush aside McMullen's bombing barrack activities, in this era of insurrection, killing, bombing and other underground covert terrorists activities by the PIRA, as being personally motivated, hit and run and isolated from PIRA's terrorist campaign. The government further argues that there is no proof that on the date of McMullen's alleged crime there was any open activity by the PIRA against the British government. This argument is novel and totally unacceptable. Because PIRA guns may have been silent, that it did not throw nor ignite bombs on the day of McMullen's bombing, although they may have been very active in terrorist conduct the day prior and the day after test the Court's credulity. A political disturbance, with terrorist activity spanning a long period of time cannot be disregarded even if, in fact, the PIRA lifted not one single finger in either Northern Ireland or Great Britain to further its cause of nationalism of Ulster on the day Claro Barracks were bombed.

The evidence in this case considering allegation of the British Government, in its complaint filed against the defendant, and the statement which McMullen gave to the New Scotland Yard in May 1977, irrefutably establishes the defendant was a member of the PIRA in 1974. At that time, he was a deserter from the British Army. The detachment from which he deserted took part in the Bloody Sunday firing in Derry in 1972.

Expert testimony, documentation, literature, and the reports and findings, international groups and organizations concerning civil rights which in the record clearly establish the PIRA in 1970 and 1974 was a political terrorist organization with an objective of nationalizing Northern Ireland. No one disputes this. The proof before us more than adequately established from British sources and defense evidence that prior to 1974 and in 1974, McMullen was a member of the PIRA, an organization existing in an era of political upheaval, which was engaged in and conducted political violence, of the most extreme nature with a solely political objective. The record is likewise well documented that the British Army and its facilities were prime targets for the PIRA's guerrilla warfare. To say that McMullen's activities in entering England, seeking out a British military barrack, clandestinely securing the necessary explosives to complete the bombing of the premises and executing the bombing, was a product of his own vengeance or personal motivation free of any political considerations, is not supported by the record. We must reject the government's assumption or speculation that McMullen was solely, personally movtivated in the bombing of the barracks. There is too much evidence to the contrary supportive of a finding that he acted as a member of PIRA, his activities were directed by persons in authority in the PIRA, and that the bombing was a crime incidental to and formed as a part of a political disturbance, uprising or insurrection and in furtherance thereof.

With this evidence before us, the burden shifts to the government to offer evidence that contradicts circumstances or activities which make the political exception applicable. *Ramos* v. *Davis, supra.* None was offered to meet this burden. The government suggests we disregard the testimony of Dr. Jeffery Prager and Dr. Rona M. Fields, on the grounds that they were unqualified to give expert testimony on the subject of political offenses. The cross-examination of these two experts was brief and in no way discredited their expertise nor soiled their opinions regarding political offenses in Northern Ireland. We accept their opinions and conclusions.

We find that the defendant has established by evidence, which we must conclude as preponderating that the act of bombing the Claro Barracks was political in character. Thus, all the two requisites of establishing the political offense exception of the Treaty having been met, we find that Peter Gabriel John McMullen is therefore not extraditable under the provisions of the Extradition Treaty in force between the United States of America and the United Kingdom as of 1974.

Dated: May 11, 1979.

FREDERICK J. WOELFLEN,
U.S. Magistrate.

97TH CONGRESS
1ST SESSION

S. 1639

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 18 (legislative day, SEPTEMBER 9), 1981

Mr. THURMOND (for himself, Mr. HATCH, Mr. KENNEDY, Mr. DENTON, Mr. LAXALT, and Mr. SPECTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1981".

SECTION 1. Chapter 209 of title 18, United States Code, is amended as follows:

(a) Section 3181 is deleted.

(b) Section 3182 is redesignated as section "3181".

(c) Section 3183 is redesignated as section "3182" and is amended by striking out "or the Panama Canal Zone" in the first sentence.

(d) A new section 3183 is added as follows:

"§ 3183. Payment of fees and costs

"All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.".

(e) Sections 3184 through 3195 are deleted.

(f) The chapter heading and section analysis are amended to read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"3181. Fugitives from State or Territory to State, District, or Territory.
"3182. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of the United States.
"3183. Payment of fees and costs.".

SEC. 2. A new chapter 210 of title 18 of the United States Code is added as follows:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. Extradition authority in general.
"3192. Initial procedure.
"3193. Waiver of extradition hearing and consent to removal.
"3194. Extradition hearing.
"3195. Appeal.
"3196. Surrender of a person to a foreign state.
"3197. Receipt of a person from a foreign state.
"3198. General provisions for chapter.

"§ 3191. Extradition authority in general

"The United States may extradite a person to a foreign state pursuant to this chapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3192. Initial procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) if not accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court;

the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"§ 3193. Waiver of extradition hearing and consent to removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§3194. Extradition hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable, unless the hearing is waived pursuant to section 3193. The purpose of the hearing is limited. The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions. The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) a deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and "(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense had been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty. and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) Certification of Findings to the Secretary of State.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3195. Appeal

"(a) In General.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) Detention or Release Pending Appeal.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it may order that the person be released pending determination of an appeal unless the Attorney General establishes to his satisfaction that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court, and, if so, shall specify the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3196. Surrender of a person to a foreign state

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter, may—

"(1) order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States.

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3197. Receipt of a person from a foreign state

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be returned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state The return of the person to the foreign state is not subject to the requirements of this chapter.

"§ 3198. General provisions for chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'court' means

"(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(2) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(3) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

"(4) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

"(5) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.".

SEC. 3. This Act shall take effect on the first day of the first month after enactment, and shall be applicable to extradition and rendition proceedings commenced thereafter.

CHANGES AFFECTED BY PROPOSED EXTRADITION LEGISLATION

1. *Limits place for filing complaint for extradition to federal courts.*

Under present law complaint can be filed in state court of general jurisdiction. In practice all complaints are presently filed in federal courts.

2. *Permits only Attorney General to file extradition complaint.*

Under present law complaints can be filed by anyone authorized by foreign government. Proposed change is in accord with the laws of most countries and can prevent significant foreign policy problems. Department of Justice in recent years has taken over handling of virtually all of foreign extradition requests pursuant to either treaty provisions or reciprocal agreements.

3. *Empowers Attorney General to file complaint with U.S. District Court for District of Columbia if fugitives whereabouts in United States not known.*

Under present law complaint can be filed only where fugitive may be found. Thus, present law precludes use of NCIC for apprehension of international fugitives in United States where whereabouts not known.

4. *Specifically prescribes contents of complaint.*

Prescribes contents in line with current practice. Present law silent as to contents of complaint.

5. *Specifies documentation necessary to support provisional arrest.*

Specified documentation is generally in accord with present practice and case law. Present statute does not deal with provisional arrest.

6. *Permits Attorney General to request summons rather than warrant for arrest.*

Present law does not provide for flexibility of summons procedure. It is anticipated that summons procedure will be used where there is no apparent flight risk thereby ameliorating codified special circumstances rule applicable to prehearing release of subjects of extradition.

7. *Requires arrested person to be taken without unnecessary delay before nearest available federal court for extradition hearing.*

Follows policy of Rule 5 F.R. Cr. P. in assuring prompt judicial notification of reasons for arrest and advice of rights. Present law silent.

8. *Codifies "special circumstances" rule for release on bail pending extradition hearing.*

Codifies rule for release set forth in Supreme Court rulings. Use of summons procedure (#6 above) will provide new flexibility with respect to prehearing release. Present statute silent.

9. *Codifies conditions of release pending extradition hearing.*

Present statute silent.

10. *Resolves ambiguity under present case law for determining commencement and termination of provisional arrest period.*

Present statute silent.

11. *Establishes procedure for waiver of extradition hearing and consent to removal.*

Almost all modern treaties provide for waiver, but do not specify procedure. Proposed law draws upon present practice and analogous prisoner transfer verification procedures. Present law silent.

12. *Prohibits courts from asserting jurisdiction to determine merits of charges by foreign state.*

In accord with case law. Present statute silent.

13. *Prohibits courts from determining whether foreign state is seeking extradition for a political offense or an offense of a political character or for the purpose of punishing person for his political opinions.*

For reasons set forth in the accompanying memorandum, ~~on pages S13238 and 13240, Cong Rec. (Sept. 23, 1980)~~ this decision should be solely an executive decision akin to the similar decision on political asylum. Presently, case law has divided decision between executive and courts with executive determining motivation of foreign country and court determining the character of offense.

14. *Requires extradition hearing to be held as soon as practicable after arrest or issuance of summons.*

Present law silent.

15. *Establishes right of person sought to representation by counsel.*

Codifies present practice. Present law silent.

16. *Specifies right of person sought to cross examine witnesses against him and to introduce evidence on own behalf.*

Codifies present practice. Present statute silent.

17. *Simplifies procedures for authentication of documents for admission at extradition hearings.*

Simplification patterned after authentication procedures in treaties and other statutes. Revises present archaic, questionable authentication rule in 18 U.S.C. 3190.

18. *Establishes admissibility of State Department affidavit on existence of treaty and its interpretation.*

Codifies present practice. Present law silent.

19. *Adopts federal probable cause standard where treaty refers to such evidence as would justify ordering a trial if the offense had been committed in the United States.*

Old case law applied state commital for trial standards. Newer case law and all modern treaties adopt federal standard. Present law silent.

20. *Establishes that extraditability may be determined solely on hearsay and/or documentary evidence.*

Codifies case law. Present statute silent.

21. *Specifies findings which court must make in finding person extraditable.*

Codifies present practice primarily based on treaty language. Present law refers only to sufficiency of evidence to sustain change under applicable treaty.

22. *Incorporates double criminality as necessary finding to extraditability.*

Almost all treaties impose this requirement. Present statute silent.

23. *Requires court to state specific reasons for its findings and to certify them to Secretary of State.*

Present statute does not require specification of reasons.

24. *Permits commencement of new extradition action only with concurrence of Secretary of State.*

Present law permits indefinite number of new actions to be brought by anyone authorized by foreign state to bring such actions.

25. Permits direct appeal by either party.

Under present law there can be no direct appeal from a court's finding of extraditability or non-extraditability. The person sought may challenge a finding of extraditability only through habeas corpus. The foreign state cannot appeal a finding of non-extraditability, but can institute a new action before a different judge. Proposed bill permits direct appeal while greatly restricting habeas corpus attacks.

26. Establishes criteria for release of person sought while appeal pending.

Present law requires commitment of person found extraditable until surrendered to requesting country. Proposed statute would permit release in such cases upon showing of special circumstances. Such release, of course, is subject to specific conditions.

27. Sets time limits for appeal and stays surrender pending appeal.

Present statute silent.

28. Provides for expedited appeal.

Present statute silent.

29. Permits Secretary of State to set conditions on surrender "to effectuate the purposes of the treaty or the interest of justice."

Codifies present practice to protect person sought beyond letter of treaty. Present statute silent.

30. Expressly authorizes Secretary of State to extradite United States nationals unless surrender is expressly prohibited by applicable treaty.

United States policy is to extradite United States nationals to countries with which we have active treaties. Newer treaties all empower Secretary of State to extradite United States nationals. Older treaties make extradition of United States nationals merely discretionary. Supreme Court held in 1936 that discretionary language insufficient to permit extradition of United States nationals. This provision would reverse effect of that case on most pre-1936 treaties.

31. *Imposes notification requirements on Secretary of State of decision to order surrender or deny request for extradition.*

Codifies present practice. Present statute silent.

32. *Sets time limits for Secretary of State to make decision and on foreign country to remove person found extraditable.*

Substitutes specific 45-day period for Secretary to act and 30-day period for foreign country to remove fugitive for ambiguous two calendar month period under present statute.

33. *Empowers Attorney General to designate agents to pick up persons sought by United States from foreign country.*

Present statute gives this power to President who has delegated it to Secretary of State.

34. *Permits temporary extradition to the United States of accused person who is otherwise in custody in foreign country.*

Permits disposition of all charges against person in United States and foreign country without requiring person to first complete foreign sentence before being extradited to United States. This provision would only be operative when not barred by treaty or laws of foreign country.

35. *Codifies payment of extradition expenses in accordance with present practice.*

Changes archaic present statute to conform to present practice developed through specific treaty provisions and informal reciprocal agreements.

Memorandum on Extradition Legislation Prepared by the Staff of the Committee on the Judiciary, U.S. Senate, in Cooperation With the Departments of State and Justice

Chapter 209 of current title 18 of the United States Code (18 U.S.C. 3181-3195) entitled "Extradition" covers both interstate rendition and international extradition. This bill would retain chapter 209 for interstate rendition provisions and create a new chapter 210 for international extradition laws.

International extradition is the process by which a person located in one nation is arrested and turned over to another nation for criminal trial or punishment. The new chapter 210 consists of eight sections. Sections 3191 through 3196 deal primarily with requests made to the United States by foreign governments and set forth the procedure for determining whether a person located in this country should be delivered up to a foreign power. Section 3197 deals with the return of a fugitive extradited to the United States from a foreign nation. Section 3198 contains definitions and a provision on payment of the expenses incident to extradition. The proposed chapter replaces 18 U.S.C. 3181 and 3184-3195.[1]

The provisions of the proposed chapter substantially alter the present statutory law for several reasons.

First, many of the statutes on extradition have been in force without major alteration since 1882. Several have not been significantly changed since 1848. These antiquated provisions have proven increasingly inadequate in dealing with the modern problems in the internation control of crime.

Second, there has been a marked increase in the number of extradition requests received and made by the United States in recent years. Those requests have revealed problems in the extradition process. Moreover, these requests have generated a number of published court decisions on constitutional and legal issues involved in international extradition. The judicial interpretation of the law contained in these court decisions fills important gaps in the present statutory law, and should be reflected in any new extradition legislation.

Third, the United States has concluded new extradition treaties with many foreign countries in the past few years. The language of the present law is not adequate to fully implement some of the provisions of the new treaties, and therefore impedes fulfillment by the United States of it international obligations.

PROVISIONS OF THE PROPOSED BILL

Section 3191—Extradition authority in general

Present Federal Law

18 U.S.C. 3181 states that the present Federal laws authorizing the extradition of persons from the United States shall continue in force only if there is a treaty in force with the foreign nation requesting extradition. 18 U.S.C. 3184 requires that an extradition treaty be in force before any court can conclude that a person may lawfully be extradited to the foreign country involved.[2] These provisions, read together, permit the United States to surrender a person to a foreign country only in accordance with an applicable treaty in force between the United States and the foreign country involved.[3] This principle has become a settled aspect of United States practice in internation extradition.

Provisions of Section 3191

Section 3191 of the proposed chapter on extradition carries forward the basic principle of the present law. The provision specifies that the United States may extradite a person in this country pursuant to the chapter only if there is a treaty concerning extradition in force with the country requesting extradition, and only if the request falls within the terms of that treaty. This section refers to a treaty "concerning extradition" rather than an "extradition treaty" because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties.[4] However, the limitation established by this section applies only to the surrender of fugitives pursuant to the chapter, and does not apply to any other legal process which may result in a person facing trial or punishment in another country. Thus, the surrender of a United States serviceman to foreign authorities for trial in accordance with the reciprocal criminal jurisdiction provisions of a Status of Forces Agreement,[5] or the deportation of an alien who happens to face criminal charges abroad,[6] remain governed by the treaty provisions and statutes relating to those processes, and not by this chapter.

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[1] Other Federal statutes on extradition, which include 18 U.S.C. 751, 752, and 1502, are not affected by this legislation.

[2] Moreover, 18 U.S.C. 3188 requires that a court find that the person sought is extraditable before the Secretary of State may order surrender to the foreign state.

[3] *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5 (1936); *Argento* v. *Horn*, 241, F.2d 258, 259 (6th Cir. 1957), cert. denied 355 U.S. 818 (1957); *Ivancevic* v. *Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954); Evans, "*Legal Basis for Extradition in the United States,*" 16 New York Law Forum 525, 529-530 (1980); 6 Whiteman, Digest of International Law 727 (1968).

Section 3192—Initial procedure

This section sets forth the steps to be followed in instituting court proceedings necessary for extradition.

Present Federal Law

Extradition proceedings under 18 U.S.C. 3184 commence when a complaint is filed, under oath, charging that a person has committed, within the jurisdiction of a foreign government, any of the crimes for which extradition is provided under the treaty on extradition in force between the United States and that foreign government. There is no requirement under present law that a formal diplomatic request for extradition be made before the complaint is filed.

18 U.S.C. 3184 permits any federal judge or justice, or duly authorized federal magistrate, or any judge of a state court of record of general jurisdiction to receive complaints and issue warrants of arrest in international extradition matters. In practice, however, such cases are almost invariably filed in the federal courts.

The present statutory scheme does not specify who may file complaints in extradition matters. The rule developed by the courts appears to be that any person acting under the authority of the demanding government may file a complaint for extradition.[7] Thus, international extradition cases have been instituted by foreign diplomatic or consular representatives,[8] foreign police officers,[9] and even private citizens who claim to be acting on behalf of a foreign government.[10] This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government.[11] However, in recent years, the United States Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition,[12] or pursuant to an informal international agreement for reciprocal legal representation.

The complaint must be filed in a Federal or State court in whose jurisdiction the fugitive may be found. Unfortunately, in many cases the international fugitive's location in the United States is unknown. Therefore, no complaint can be filed and no arrest warrant can be issued. The ability of the United States law enforcement agencies to locate and apprehend international fugitives is greatly hampered by the lack of an outstanding arrest warrant or other judicial process in such cases.[13]

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[4] See e.g., Art. 14, Amending Protocol to the 1961 Single Convention on Narcotic Drugs, done at Geneva, March 24, 1972, 26 U.S.T. 1439, T.I.A.S. 8118 (entered into force for the United States August 8, 1975); Art. 8, Convention on Suppression of Unlawful Seizures of Aircraft; done at The Hague, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192 (entered into force for the United States October 14, 1971); Art. 8, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York, December 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532 (entered into force for the United States February 20, 1977).

[5] See, e.g., *Holmes* v. *Laird*, 459 F.2d 1211, 148 U.S. App. D.C. 187 (D.C. Cir. 1972), cert. denied, 409 U.S. 869 (1972); *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972).

[6] See, e.g., *Kalatijis* v. *Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

[7] 6 Whiteman, supra note 3, at 935.

[8] *United States ex rel Caputo* v. *Kelley*, 92 F.2d 603 (2nd Cir. 1937), cert. denied, 303 U.S. 635 (1938); *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896); *Castro* v. *DeUrierte*, 12 Fed. 250 (S.D. N.Y. 1882). See, generally, 6 Whiteman, supra note 3, at 935; Note, United States Extradition Proceedings, 16 New York Law Forum 420, 432 (1980).

[9] Moore, a Treatise on Extradition and Interstate Rendition, 410-415, (1891).

[10] See, e.g., *Schoenbrun* v. *Drieband*, 268 F. Supp. 332 (E.D. N.Y. 1967).

[11] See, e.g., *United States ex rel. Caputo* v. *Kelley*, *supra* note 8.

[12] In re David, 395 F. Supp. 803, 807 (E.D. Ill. 1975); *United States ex rel. Petruschansky* v. *Marasco*, 215 F. Supp. 953, 957 (E.D. N.Y. 1963) aff'd 325 F.2d 562 (2nd Cir. 1963), cert. denied, 376 U.S. 952 (1964).

[13] For example, many Federal, State, and local law enforcement agencies rely on the FBI's National Crime Information Center—"NCIC"—in determining whether an individual is wanted

The present statutory scheme contains no provision for the release of an alleged fugitive on bail pending the extradition hearing.[14] However, the courts have claimed the inherent right to release an alleged fugitive on bail pending the extradition hearing in cases where "special circumstances" require such release.[15] The standard for release on bail in extradition cases is more demanding than in ordinary cases, and a clear presumption against bail is recognized.[16]

Provisions of Section 3192

Subsection (a) permits the Attorney General to file a complaint charging that a fugitive is extraditable in the United States district court for a district in which the fugitive may be found. The subsection also permits a complaint to be filed in the United States District Court for the District of Columbia if the fugitive's location is not known. Under this provision, a complaint could be filed, and an arrest warrant issued, when the whereabouts of the fugitive in the United States are still being ascertained, or when it is believed that the fugitive has not yet entered the United States but may be about to do so. The word "found" is intended to have its usual, non-technical meaning, and permits extradition proceeding to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district.[17]

Subsection (b) prescribes the contents of a complaint for extradition. Since all United States extradition treaties specify the documents and quantum of evidence necessary for surrender, paragraph (1) states that an extradition complaint is sufficient if it is accompanied by the evidence specified in the treaty and a copy of the formal request for extradition. Paragraph (2) deals with the documentation necessary to support a "provisional arrest," the process by which a fugitive from justice is arrested to prevent further flight while the foreign government seeking extradition assembles the necessary documents and evidence.[18] Subparagraph (A) of paragraph (2) provides that a complaint will support an arrest under subsection (c) if it contains information sufficient to identify the fugitive, explains the circumstances necessitating provisional arrest,[19] and either indicates that a warrant for the fugitive's arrest is outstanding in the foreign state,[20] or outlines the essential facts indicating that an extraditable crime has been committed and that the fugitive committed it. Since many of the extradition treaties contain articles which expressly set out requirements for obtaining the arrest of fugitives,[21] subparagraph (B) of paragraph (2) also permits the complaints to be filed if it contains the information required by the provisions of the applicable treaty.

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for arrest in another jurisdiction. Since no complaint for extradition can be filed against a fugitive whose location is unknown, there can be no Federal arrest warrant issued, and no information on the person will appear in NCIC. Thus, law enforcement officers may have no way to learn that a particular person is an international fugitive sought for extradition.

[14] In *Wright* v. *Henkel,* 190 U.S. 40 (1903), the Supreme Court reviewed former section 596 of title 18 (now 18 U.S.C. 3141) in conjunction with former section 591 (now 18 U.S.C. 3041), and concluded that there was no statute providing for admission to bail in cases of foreign extradition. The Bail Reform Act (which amended Sections 3041, 3141-3143, and 3568, and enacted 18 U.S.C. 3147-3152), did not alter this result. The Act liberalized access to bail in those cases to which the bail statutes apply, but did not broaden the availability of bail generally. Both the previous sections of the law and the provisions of the Bail Reform Act apply only to "person(s) charged with an offense," and the term "offense" is expressly defined in 18 U.S.C. 3156 as "any federal criminal offense which is in violation of any act of Congress and is triable by a court established by act of Congress . . .". Since fugitives facing extradition to a foreign country are not accused of any federal criminal offense, and will not be tried in any Federal court, the bail statute's provisions do not apply to them. *Cf. Kelley* v. *Springette,* 527 F.2d 1090, 1093 (9th Cir. 1975); *Beaulieu* v. *Comm'r of Massachusetts,* 382 F.2d 290 (1st Cir. 1967).

[15] *United States* v. *Williams,* 611 F.2d 914 (1st Cir. 1979); *Beaulieu* v. *Hartigan,* 554 F.2d 1 (1st Cir. 1977); *Wright* v. *Henkel, supra* note 14.

[16] *Hu Yan-Leung* v. *Soscia,* — F.2d ——, No. 80-2356 (2d Cir. May 26, 1981).

[17] See, *In re Chan Kam-Shu,* 477 F.2d 333 (5th Cir. 1973), cert. denied, 414 U.S. 847 (1973); *Vardy* v. *United States,* 529 F.2d 404 (5th Cir. 1976), rehearing denied, 533 F.2d 310 (5th Cir. 1976); *In re David,* 390 F. Supp. 521 and 395 F. Supp. 903 (E.D. Ill. 1975).

[18] Provisional arrest is a well-recognized aspect of international extradition procedure, and is specifically provided for in most of the extradition treaties to which the United States is a party. See, e.g., Art. 11, Extradition Treaty, United States-Canada, signed Dec. 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force Marcy 27, 1976). See generally, Reuschlein, "Provisional Arrest and Detention in International Extradition," 23 Georgetown Law Journal 37 (1934); Note, 16 New York Law Forum 420, 429-430 (1970).

[19] E.g., contains an indication that the fugitive is likely to flee the jurisdiction and be unavailable by the time the extradition documents arrive.

[20] See, 6 Whiteman, *supra* note 3, at 931; *Whitely* v. *Warden, Wyoming State Penitentiary,* 401 U.S. 560, 568 (1970); *United States* v. *McCray,* 468 F.2d 848 (5th Cir. 1967).

[21] See, e.g., *Caltigerone* v. *Grant,* 629 F.2d 739 (2d Cir. 1980).

Subsection (c) obliges the court to issue a warrant for the arrest of the fugitive upon receipt of the complaint unless the Attorney General requests that a summons to appear at the extradition hearing be issued instead. The subsection requires that the warrant of arrest be executed in accordance with Rule 4(d) of the Federal Rules of Criminal Procedure. This means that the warrant may be executed anywhere in the United States in the same manner as an ordinary Federal warrant of arrest. The subsection also requires that the person arrested be taken without unnecessary delay before the nearest available Federal court [22] for an extradition hearing. The language is similar to that of Rule 5 of the Federal Rules of Criminal Procedure, and is intended to insure that the person arrested under this section is speedily informed by a judicial officer of the reason for the arrest and of his rights to counsel, to cross-examine witnesses, and to introduce evidence on his behalf. It is not intended to require the dismissal of extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the "nearest" one. There is no requirement that the extradition hearing take place in the State in which the fugitive is found,[23] so long as there has been compliance with the provisions of this chapter.

Subsection (d)(1) provides that a fugitive arrested for extradition may be released on bail pending the extradition hearing only if he can demonstrate that "special circumstances" warrant his release. The provision continues the approach which has been followed by United States courts [24] in setting the standards for release on bail pending an extradition hearing considerably higher than the standards for release on bail pending trial on Federal charges in the United States. This approach is necessary to assure that the United States continues to carry out its treaty obligation to surrender extraditable fugitives. It is anticipated that the courts will find the "special circumstances" test satisfied "only in the most pressing circumstances and only when the requirements of justice are absolutely peremptory." [25] Such special circumstances might be found, for instance, where the incarceration of the fugitive would seriously damage his health,[26] or would endanger the welfare of a third party who is wholly dependent upon the fugitive for care.[27] It is anticipated that these circumstances would rarely be encountered.

Subsection (d)(3) provides that even if special circumstances are found, the release of the fugitive shall be permitted only upon such conditions as will reasonably assure his appearance at future proceedings, and assure the safety of other persons and the community. Such conditions might include surrender by the fugitive of any passport or travel documents, posting of a substantial bond, and the requirement that the fugitive maintain contact with appropriate Federal agencies, such as the United States Marshals Service.

Subsection (d)(2) gives the court the discretion to release the fugitive provisionally arrested pursuant to this section if the evidence or documents required by the applicable treaty are not received within sixty days of the arrest (unless a longer period of detention is specified in the applicable treaty). The subsection resolves an ambiguity perceived by the courts with respect to the commencement and conclusion of the time period for provisional arrest by providing that this period should be calculated from the date on which the fugitive is taken into custody for extradition [28] to the date on which the documents are received by either the court or the Department of State.[29] If the court is notified that the documents have been received by the Department of State before the expiration of the 60-day period, the court is directed to defer release of the fugitive for a reasonable time pending the prompt transmission of the documents to the court by the Department of State. If a court does release the fugitive from custody due to the non-receipt of the documents within the applicable time period, subsection (d)(3) requires that the court frame conditions of release reasonably calculated to assure that person's appearance for future proceedings and the safety of other persons and the community. Release of the fugitive under subsection (d) does not terminate the proceedings, which can resume once appropriate documentation arrives.[30]

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[22] "Court" is defined in section 3198(a)(1) to mean a United States district court established pursuant to 28 U.S.C. 132, or the District Court of Guam, the Virgin Islands, or the Northern Mariana Islands, or a United States magistrate authorized to conduct an extradition proceeding.

[23] Thus, the section eliminates the arbitrary rule created by the Supreme Court in *Pettit* v. *Walshe,* 194 U.S. 205 (1904). See note 40, infra, and accompanying text. This rule is unnecessary in light of proposed section 3194(c)(3).

[24] See notes 15 and 16, *supra.*

[25] *In re Mitchell,* 171 Fed. 289, 290 (S.D. N.Y. 1909).

[26] See, e.g., In re Kaplan, Civ. No. 79-2219 RF (C.D. Cal. July 29, 1979).

[27] See, e.g., *In re Itoka,* Misc. No. 79-1536-M (D. N.M. Dec. 17, 1979).

[28] See, *In re Chan Kam-Shu,* 477 F.2d 333, 339-340 (5th Cir. 1973) cert. denied, 414 U.S. 847 (1973).

[29] *United States* v. *Clarke,* 470 F. Supp. 979 (D. Vermont 1979).

This section does not carry forward 18 U.S.C. 3184's little used authorization for extradition proceedings to be commenced before State judges. The section also specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government.[31] These changes reflect the fact that international extradition is strictly a function of the Federal government,[32] and determining when and how to perform that function is properly the business of Federal officials and Federal courts. The United States government has a sufficient interest in the virgorous enforcement of the laws (including the extradition law and treaties) to justify the participation of its legal counsel, the Department of Justice, in all court proceedings aimed at determining whether extradition can take place. Indeed, this is the approach which has been adopted in most foreign countries, many of which do not permit the United States to argue in court during proceedings in connection with a United States extradition request. In addition, United States courts are freed from any need to determine whether a private person is "authorized" by an "appropriate" foreign authority to initiate extradition proceedings. It should also significantly reduce the likelihood of extradition proceedings being sued by private individuals as a tool for harrassment, debt collection, or other improper purposes.

Section 3193—Waiver of extradition hearing and Consent to Removal

Present Federal Law

Present Federal law provides no specific procedure by which a person arrested for extradition may waive the formalities and voluntarily return to the foreign country requesting surrender. This is especially unfortunate since a significant number of the fugitives arrested under 18 U.S.C. 3184 choose not to challenge the request for extradition and wish to expedite removal to the foreign country. Moreover, many of the newer extradition treaties to which the United States is a party contain provisions obliging the requested state to expedite the return of a fugitive who has waived a hearing or other procedures.[33]

Provisions of Section 3193

Section 3193 of the proposed extradition chapter clarifies the method by which the fugitive who does not contest extradition can expedite his surrender. The provisions of this section are based on Federal statutory provisions governing a closely analogous situation: the verification of a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions.[34] The section states that the court which would have handled the extradition proceeding shall verify that the fugitive's consent to be removed to a foreign country has been given voluntarily and with full knowledge of his right to consult with counsel before making a decision in the matter.

Under some circumstances, the foreign government may not be willing to accept custody of a fugitive who has offered to waive extradition.[35] There also may be situations in which the United States government would consider waiver inappropriate.[36] Therefore, the provision does not permit removal of the fugitive if the

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[30] E.g., Art. 13(2), Extradition Treaty, United States-Norway, signed June 9, 1977, —— U.S.T. ——, T.I.A.S. 9679 (entered into force March 6, 1980).

[31] It is anticipated that in most cases the Attorney General will act through the United States attorney for the district in which the fugitive is located. If the foreign government involved feels the need to participate in the judicial proceedings, it can retain counsel and seek to enter the case as amicus curie.

[32] *Valentine* v. *United States ex rel. Neidecker, supra* note 3, at 5, 8: *United States* v. *Rauscher,* 119 U.S. 407, 414 (1886).

[33] See e.g., Art. 10, Extradition Treaty, United States-Japan, signed March 3, 1978, —— U.S.T.——, T.I.A.S. 9625 (entered into force March 25, 1980); Art. 18, Extradition Treaty, United States-Mexico, signed May 4, 1978, U.S.T. , T.I.A.S. 9656 (entered into force January 24, 1980).

[34] See 18 U.S.C. 4107-4108.

[35] For example, a fugitive might wish to waive extradition on only one of many outstanding charges against him in the requesting state. Under these circumstances, that foreign state might conceivably prefer to have extraditability determined as to all of the charges.

[36] For example, many extradition treaties permit the requested state to postpone extradition until the person sought has been tried and punished for criminal charges outstanding in that state. A person facing criminal charges or imprisonment in this country might well attempt to expedite his extradition to a foreign country where less serious charges are pending, in order to avoid prosecution or punishment here. In such circumstances, it would not be appropriate for

Attorney General notifies the court that the United States or the foreign state objects to the proposed waiver.

Section 3194—Extradition hearing

Present Federal Law

Under 18 U.S.C. 3184, an alleged fugitive is entitled to a hearing at which a judicial officer determines whether extradition is lawful. 18 U.S.C. 3189 specifies that the hearing must be held "on land, publicly, and in a room or office easily accessible to the public."

At the extradition hearing, the judicial officer must determine whether the offense for which extradition is sought falls within the terms of the treaty. He must also determine whether the acts for which the fugitive is sought by the foreign country would constitute a crime had they been committed in this country. This rule, known as "dual criminality" or "double criminality", is generally considered a basic principle of international extradition law,[37] and is expressly required by many of the extradition treaties to which the United States is a party.[38] The courts have held that the double criminality requirement is satisfied whenever the acts which the fugitive is charged with having committed in the foreign country would be punishable under Federal law, the law of the State where the fugitive is found, or the laws of a majority of the States, had those acts been committed in this country.[39]

A judicial officer must also determine whether there is sufficient proof that an extraditable offense in fact has been committed. Most of the treaties to which the United States is a party require that an extradition request be supported by "such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his commitment for trial had the crime or offense been there committed." Many years ago, the courts viewed the words "place where the fugitive shall be found" as requiring the Federal court to determine if the foreign government's evidence is sufficient to justify a trial under the State laws of the State in which the fugitive is apprehended.[40] This approach was a reasonable one eight decades ago, because at that time Federal courts had no uniform rules of criminal procedure and routinely followed the procedural rules of the courts of the State in which they were located. However, the adoption of the Federal Rules of Criminal Procedure has made it generally unnecessary for Federal courts to refer to State law in these matters.[41] Moreover, extradition is a national act,[42] and the quantum of evidence necessary for extradition is precisely the kind of issue which should be determined by uniform national law, rather than by various State laws. For these reasons, all of the more recent extradition treaties contain language essentially requiring that the Federal law standard of commitment for trial—probable cause—be applied in weighing the sufficiency of the evidence for international extradition.[43]

The Federal Rules of Evidence do not apply in extradition proceedings,[44] where unique rules of wide latitude govern the reception of evidence on behalf of the foreign government.[45] It is settled law that hearsay is admissible, and the foreign government usually presents its case by submitting affidavits, depositions, and other written statements in order to satisfy the requirements of the applicable treaty.[46]

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the United States to permit expedited surrender, at least not until the charges in this country have been resolved or the sentence served.

[37] Shearer, Extradition in International Law, 137-141 (1971); 6 Whiteman, *supra* note 3, at 773-779; *Freeman* v. *United States*, 437 F. Supp. 1252, 1263 (N.D. Ga. 1977).

[38] See, e.g., Art. 2(1), Extradition Treaty, United States-Japan, signed March 3, 1978, U.S.T. , T.I.A.S. 9625 (entered into force March 25, 1980).

[39] *Cucuzella* v. *Kelilkaa*, 633 F.2d 105 (9th Cir. 1981); *Brauch* v. *Raiche*, 618 F.2d 843, (1st Cir. 1980); March 5, 1980); *Freedman* v. *United States*, *supra* note 37, at 1252, 1263.

[40] *Pettit* v. *Walshe*, *supra* note 23; see e.g., U.S. ex rel. *LoPizzo* v. *Mathews*, 36 F.2d 565 (3d Cir. 1929); U.S. ex rel. *Rauch* v. *Stockinger*, 170 F. Supp. 506 (E.D. N.Y. 1959), aff'd 269 F.2d 681 (2d Cir. 1959), cert. denied, 371 U.S. 913 (1959); *O'Brien* v. *Rozmann*, 554 F.2d 780 (6th Cir. 1977).

[41] *Greci* v. *Birkness*, 527 F.2d 956, 958, at note 3 (1st Cir. 1976); Application of D'Amico, 185 F. Supp. 925, 930, at note 6 (S.D.N.Y. 1960), appeal dismissed, 286 F.2d 320 (2d Cir. 1960), cert. denied, 366 U.S. 963 (1962).

[42] 6 Whiteman, *supra* note 3.

[43] *Greci* v. *Birkness*, supra note 41; *Sindona* v. *Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978); *Brauch* v. *Raiche*, *supra* note 39.

[44] *Sayne* v. *Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), cert. denied, 390 U.S. 903 (1970).

[45] Rule 1101, Federal Rules of Evidence.

[46] The Supreme Court has indicated that requiring the foreign state to produce live witnesses in extradition hearings would tend to "defeat the whole object of the treaty." *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); see also, *Collins* v. *Loisel*, 259 U.S. 309. 317 (1922); *Sayne* v. *Shipley*, *supra* note 44; In re David, *supra* note 12; *O'Brien* v. *Rozmann*, *supra* note 40.

18 U.S.C. 3190 provides that originals or copies of depositions, warrants, or other papers are admissible in evidence at the extradition hearing if autheniticated so as to be admissible for similar purposes according to the laws of the requesting country. The statute also provides that the certificate of the principle diplomatic or consular officer of the United States resident in the requesting country shall be proof that the documents are authenticated in the manner required. In essence, the documents need only be genuine and authentic—requirements that are deemed fulfilled once it is shown that under similar circumstances the requesting country's own courts would accept them as authentic. The courts have held that extradition documents bearing a certificate which is couched in the language of 18 U.S.C. 3190, and signed by one of the specified officials, are conclusively admissible.[47] As a result of these decisions, foreign governments routinely submit the documentation in support of extradition requests to the appropriate United States Embassy abroad for certification and transmission to the United States. This practice imposes undesirable burdens on the United States Foreign Service officers who must fill out the certification.[48]

The present statutory scheme offers little guidance with respect to the evidence which can be introduced on behalf of the alleged fugitive in an extradition hearing. Many cases emphasize that whether such evidence should be admitted is a decision for the court, in its discretion, to make.[49] The alleged fugitive is ordinarily permitted to testify on his own behalf[50] or to have witnesses testify for him.[51] However, it is clear from the case law that the alleged fugitive may offer to explain ambiguities in the evidence submitted against him, but may not offer evidence which merely contradicts that submitted by the requesting country, or which poses a question of credibility, or which raises an affirmative defense to conviction on the charges, or which is incompetent by the terms of the extradition treaty under which surrender is sought.[52] This restrictive approach is appropriate because the issue before the court at an extradition hearing is probable cause, not the ultimate guilt or innocence of the accused.

Finally, the judicial officer must determine whether the treaty contains a defense to extradition which would preclude surrender in the case before him. Extradition treaties frequently bar surrender if a statute of limitations has foreclosed prosecution or punishment for the offense in question,[53] or if the fugitive has been tried or punished in the requested state for the same offense,[54] or if any of several other legal considerations are present.

Virtually every extradition treaty contains a provision barring extradition for a political offense, and many treaties also preclude extradition if the requesting country has political motives for seeking the return of the fugitive. Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense[55] but traditionally have declined to consider whether the requesting country's motives in seeking extradition are political.[56] Since these issues are usually intertwined, the result under current case law has been that the court decides the applicability of the "political offense" exception in some cases, and the Executive branch decides the applicability in other cases.[57] The possibility for inconsistent results is obvious.

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[47] *United States* v. *Galanis,* 429 F.2d 1215, 1225–1229 (D. Conn. 1977), rev'd on other grounds, 568 F.2d 234, 240 (2d Cir. 1977); *Shapiro* v. *Ferrandina,* 478 F.2d 894, 903 (2d Cir. 1973); *In re Edmonson, et al.* 352 F. Supp. 22, 24 (D. Minn. 1972).

[48] Frequently, the consular and diplomatic officers who must sign the certificate are not lawyers, and it is difficult for them to know whether the documents presented to them are in fact acceptable "for similar purposes" in the courts of the requesting state.

[49] *Freedman* v. *United States, supra* note 37; U.S. ex rel. *Petrushansky* v. *Marasco, supra* note 12.

[50] Coppelman, "Extradition and Rendition: History-Law-Recommendations," 14 Boston L.R. 591, 614 (1934).

[51] 18 U.S.C. 3191 provides for compulsory process to secure the attendance at extradition hearings of witnesses on behalf of indigent fugitives. However, the statute applies only to witnesses who are resident in the United States. *Merino* v. *United States Marshal,* 326 F.2d 5, 11 (9th Cir. 1964), cert denied, 377 U.S. 997 (1964).

[52] Matter of Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978); *Shapiro* v. *Ferrandina, supra* note 47; *Freedman* v. *United States, supra* note 37; *Sayne* v. *Shipley, supra* note 44; *First National City Bank* v. *Aristequieta,* 287 F.2d 219, 226 (2d Cir. 1960); *Desmond* v. *Eggers,* 18 F.2d 503, 505–506 (9th Cir. 1927); *Collins* v. *Loisel, supra* note 46; *Charlton* v. *Kelley,* 229 U.S. 447, 458 (1913).

[53] See, generally, 6 Whiteman, *supra* note 3, at 859–865; Note, Statute of Limitations in International Extradition, 48 Yale L.J. 701 (1939).

[54] See, e.g., *Galanis* v. *Pallanck,* 568 F.2d 234 (2d Cir. 1978).

[55] In re Ezeta et al., 62 Fed. 972 (N.D. Cal. 1894). Basically, a political offense is one "committed in the course of furthering civil war, insurrection or political commotion." Id.; *Karadzole* v. *Artukovic,* 242 F.2d 198 (9th Cir. 1957), rev'd on other grounds, 344 U.S. 393 (1957); *United States ex rel Karadzole* v. *Artukovic,* 170 F. Supp. 383 (S.D. Cal. 1959); *Ramos* v. *Diaz,* 179 F. Supp. 459 (S.D. Fla. 1959).

[56] In re Lincoln, 228 Fed. 70 (E.D.N.Y. 1915), aff'd per curium, 241 U.S. 651 (1917); *In re Gonzalez,* 217 F.2d 717, 722 (S.D.N.Y. 1963); *Garcia-Guillerin* v. *United States,* 450 F.2d 1192 (5th Cir. 1971); *In re Locatelli,* 468 F. Supp. 568, 575 (S.D.N.Y. 1979); *Sindona* v. *Grant, supra* note 43.

If the judicial officer is persuaded that the crime charged falls within the treaty, that the acts involved would constitute an offense in this country, that the evidence submitted is sufficient to sustain the charge under the treaty, and that no legal defense to extradition is applicable, it is his duty to certify these conclusions to the Secretary of State. The judicial officer also must send the Secretary of State a copy of all the oral testimony taken at the hearing. 18 U.S.C. 3184 requires the judicial officer to order the commitment of the accused to jail pending surrender, and there is no provision for release on bail at this stage of the proceedings. If the judicial officer finds that the fugitive is not extraditable, the proceedings are terminated, and the fugitive is released from custody.

Provisions of Section 3194

Section 3194(a) requires that a judicial hearing be held to determine whether the person sought is extraditable (unless such a hearing has been waived under section 3193) and sets out the procedure for the hearing.

Section 3194(a) provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs, while section 3196(a)(3) specifies that the Secretary of State has the authority to decline to order surrender of a person if he is persuaded that his extradition is sought for one of these reasons. The provisions together provide that the Secretary of State alone shall have jurisdiction to decide the applicability of the "political offense" exception to extradiction contained in most extradition treaties. This approach is a desirable one for several reasons.

First, the most modern United States extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception.[58] Moreover, under present case law the courts generally shun deciding whether the foreign government's extradition request is politically motivated preferring to leave that decision to the Executive branch.[59] Thus, the approach adopted in this proposal is not a radical departure from present law. It should be noted that the political offense decisions are made exclusively by the executive branch of government in several foreign countries, including Canada.

Second, the decision to shield a criminal from extradition on the ground that his offense was "political" is not the kind of issue which lends itself to resolution through the judicial process. There are few truly objective criteria by which a comprehensive definition of the term "political offense" can be based,[60] and a public court proceeding is not an appropriate or desirable forum for careful analysis of a friendly foreign state's intentions or political system. Rather, a decision on the "political offense" exception is (as the name suggests) inescapably political in nature and inextricably intertwined with the conduct of foreign relations. it is an issue best left to the executive branch to decide—much as the decision to offer political asylum is an executive decision.

Third, a decision on the political offense exception can have a devastating impact on U.S. relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise U.S. efforts to combat international terrorism.[61] The present law exacerbates this situation, because frequently the U.S. Government, through the Departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court. Moreover, the Government must take this position publicly, before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against extradition on other grounds. By contrast, the approach taken by the proposed legislation permits a more informed decision on extradition to be made in a manner less likely to be offensive to the foreign government in the case.

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[57] *Zyad Abu Eair* v. *Wilkes*, 641 F.2d 504 (7th Cir. 1981).

[58] See, e.g., Art. 5(1), Extradition treaty, United States-Mexico, signed May 4, 1978, —— U.S.T. ——, T.I.A.S. 9656 (entered into force January 25, 1980).

[59] See note 56, *supra*.

[60] Levy, Contemporary International Law: A Concise Introduction, 190 (1979) The courts in various countries differ widely on what kinds of offenses are covered by the term, and legal scholars here and abroad have proposed a host of different—and frequently contradictory—proposals on the topic. See, generally, Carbonneau, "The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created," 1 ASILS International Law Journal 1 (1977).

[61] For instance, in *In re McMullen*, No. 3-78-1099MG (N.D. Cal. May 11, 1979), a Federal magistrate in San Francisco barred the extradition to England of an admitted IRA bomber, holding that the fugitive's action (blowing up an army barracks in England) was an offense of a political character. This decision was a considerable setback for United States efforts to control international terrorism, and could make the United States a more attractive refuge for members of the IRA, the PLO, the Beider-Meinhoff gang, the Italian Red Brigade, and other terrorists.

Subsection (b) supplements present law by expressly providing that the fugitive be informed of his right to be represented by counsel at the extradition hearing. Indigent fugitives will be provided with counsel pursuant to the provisions of section 3401 relating to court-appointed counsel. The provision also requires that the fugitive be informed of his right to introduce evidence in his own behalf on matters within the jurisdiction of the court. The subsection thereby leaves intact the extensive case law on this point.[62]

Subsection (c) deals with evidence in an extradition hearing. Paragraph (1) is designed to clarify the circumstances under which documentary evidence will be admissible on behalf of either party in an extradition hearing.

Many treaties specifically set out the manner in which extradition documents must be authenticated,[63] and subparagraph (A) of paragraph (1) provides that documents so authenticated shall be admissible. It also provides that documents authenticated in accordance with the provisions of United States law shall be deemed appropriate. Thus, documents which comply with the requirements of Article IX of the Federal Rules of Evidence would be admissible in extradition proceedings. However, the provision does not require the exclusion from the hearing of evidence which fails to satisfy the Federal Rules of Evidence. Rather, the subsection merely underscores the common sense proposition that evidence which satisfies the high standards set out in the Rules, and which would be admissible in civil or criminal proceedings in this country, should likewise be acceptable in extradition proceedings.

Subparagraph (B) of paragraph (1) is based on 18 U.S.C. 3190 and provides that a document authenticated in accordance with the applicable laws of the foreign country requesting extradition shall be admissible if it is accompanied by an attestation to this effect from a judge, magistrate, or other appropriate officer of the foreign state. The phrase "other appropriate officer" would include an official of the foreign counterpart of the Department of Justice, or any other government official likely to be familiar with legal matters in the foreign country. It further requires that the signature and position of the person so attesting be certified by a diplomatic or consular officer of the United States posted in the foreign country, or by a diplomatic or consular officer of the foreign state assigned to this country.[64] The provision thus bring the essential requirements of 18 U.S.C. 3190 more into line with Rule 902(3) of the Federal Rules of Evidence.

Subparagraph (C) of paragraph (1) permits the court handling an extradition matter to accept as evidence any documents which it is persuaded are in fact authentic, regardless of compliance with either of the previous two provisions. This rule is similar to Rule 901(a) of the Federal Rules of Evidence, and is in accord with established case law permitting the authenticity of documents presented in extradition proceedings to be established by testimony from expert witnesses or by other evidence.[65]

Paragraph (2) of subsection (c) provides that a certificate or affidavit by an appropriate State Department official as to the existence or interpretation of a treaty is admissible as evidence of that treaty or its interpretation.

The overwhelming majority of extradition treaties require that the requesting country present such evidence of criminality as would justify commitment for trial had the crime or offense been committed in the place where the fugitive has been found. Under paragraph (2) such a treaty provision may be satisfied by evidence establishing probably cause to believe that a crime was committed and that the person sought committed it. This is the usual standard for commitment for trial in

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[62] See *supra* note 52, and accompanying text.

[63] See, e.g., Art. 10(6), Extradition Treaty, United States-Mexico, signed May 4, 1978, ——, U.S. T. ——, T.I.A.A. 9656 (entered into force January 25, 1980). The United States will also be a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague, October 26, 1960, 527 U.N.T.S. 189 (ratified by the Senate Nov. 28, 1979). This Convention will eliminate a substantial portion of the authentication requirement with respect to extradition documents submitted by one signatory country to another.

[64] It is anticipated that in most cases the foreign state's diplomatic or consular personnel assigned to the United States will make the certification required by the section, thereby relieving U.S. diplomatic and consular officers abroad of this chore.

[65] See, generally, *United States* v. *Galanis*, *supra* note 54.

Federal criminal cases.[66] This approach permits the Federal courts to apply the standard for commitment with which they are most familiar, and establishes a single, uniform standard by which the sufficiency of evidence in extradition proceedings may be measured. It is also consistent with the views expressed in several recent court decisions pointing out the advantages of dealing with the quantum of evidence for extradition in a manner consistent with Federal law.[67]

Paragraphs (1), (2), and (3) of subsection (d) carry forward the requirements of 18 U.S.C. 3184 that instruct the court to find the fugitive extraditable if the evidence presented is sufficient to sustain the complaint under the provisions of the applicable treaty and also requires that the court find probable cause that the person before it is the person sought in the foreign state, and that none of the defenses to extradition which the court is empowered to consider are applicable. Paragraph (4) bars extradition unless the acts for which the fugitive's surrender is requested would constitute a crime punishable under State or Federal law in the United States. Finally, the subsection states that the findings required for extradition may be established by hearsay evidence or certified documents alone. This rule is similar to Rule 5.1 of the Federal Rules of Criminal Procedure, which permits a finding of probable cause to commit for trial to be based on hearsay evidence. It is also in accord with recent court decisions which point out that the kind of evidence necessary for extradition is an issue which should be determined by uniform national law.[68]

Subsection (e) details the procedures that the court must follow at the conclusion of the hearing. If the court finds that the fugitive is extraditable, it must state, in writing, its findings and rationale with respect to each of the offenses for which extradition is sought.[69] These findings must be sent to the Secretary of State, together with a transcript of the hearing.[70] If the court finds that the fugitive is not extraditable, the findings required by the subsection may be accompanied by a report rather than a transcript of the hearing.

Section 3195—Appeal

Present Federal Law

Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing.[71] A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus.[72] The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition.[73] The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious.

Provisions of Section 3195

Section 3195 of the proposed chapter permits either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision. It is anticipated that review on appeal will be very narrow, and that any findings of fact by the lower court will be affirmed unless they are clearly erroneous.

Subsection (a) specifies that the appeal shall be filed within the time limits set out in Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, i.e., 10 days for the person sought and 30 days for the government. These are the same deadlines for filing a notice of appeal in criminal cases, and while an extradition hearing is not a trial,[74] or even strictly a criminal proceeding,[75] these deadlines adequately balance the competing interests of fairness and expedition. It is anticipated that other aspects of the appeal process (such as the preparation and submission of the record, briefing, argument, and decision) will be governed by the applicable provisions of the Federal Rules of Appellate Procedure.

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[66] See Rule 5.1, Federal Rules of Criminal Procedure.

[67] *Greci* v. *Birkness, supra* note 43; *Brauch* v. *Raiche, supra* note 39.

[68] *U.S. ex rel. Sakaguchi* v. *Kaulukukui,* 520 F.2d 726, 728 (9th Cir. 1975); *Shapiro* v. *Ferrandina, supra* note 47.

[69] This requirement is consistent with the practice followed by the courts today. See *Kaplan* v. *Vokes,* —— F.2d ——, No. 79-2662 (9th Cir. July 6, 1981); *Shapiro* v. *Ferrandina, supra* note 47.

[70] Present law (18 U.S.C. 3184) only requires that the court send the Secretary a transcript of the testimony taken at the hearing. By providing the executive branch with a fuller record of the proceedings, the Secretary of State will be more fully informed in making his decision on extradition.

[71] *Collins* v. *Loisel, supra* note 46.

[72] See, e.g., *Sindona* v. *Grant, supra* note 43.

[73] *Hooker* v. *Klein,* 573 F.2d 1360 (9th Cir. 1978).

[74] *Glucksman* v. *Henkel,* 221 U.S. 508, 512 (1911).

[75] *United States ex rel. Oppenheim* v. *Hecht,* F.2d 955, 956 (2nd Cir. 1927); *United States ex rel. Klein* v. *Mulligan,* 1 F. Supp. 635, 636 (S.D. N.Y. 1922).

If the fugitive has been found extraditable, subsection (a) requires that surrender to the foreign government be stayed pending determination of the appeal by the court of appeals.[76] This provision prevents the government from mooting the appeal by spiriting the petitioner out of the country while the matter is *sub judice*. The provision is designed to maintain the *status quo* with respect to the fugitive's cutody pending appeal. It is anticipated that the district court will not ordinarily stay or delay any other element of the extradition process, such as the certification of its findings to the Secretary of State under section 3194(e).

Subsection (b) provides that a person found extraditable must remain in official detention pending the appeal unless the court of appeals finds that special circumstances require release. This is a slight amelioration of present law, which does not permit the release of a fugitive on bail after he has been found extraditable.[77] The change is desirable because the same kind of pressing, unusual situation which might require that the person sought be released from custody on bail pending the extradition hearing [78] could conceivably arise after the extradition hearing. However, it is anticipated that this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender . . .".[79]

If the person was found not extraditable, subsection (b)(2) permits the district court to order that the person be released pending an appeal by the government. Release may not be ordered if the government satisfies the district court that the appellee is likely to flee before the appeal is decided, or endanger the safety of any other person or the community.

A major purpose of section 3195 is to simplify, and thereby expendite, the extradition process by providing for a direct appeal from a contested decision on extradition. The direct appeal provided by this section largely eliminates the present need for habeas corpus proceedings in order to obtain judicial review of the initial finding that a person is extraditable. This purpose would be frustrated if a fugitive bent on dilatory tactics were permitted to pursue an appeal under this section, a petition for certiorari to the Supreme Court, and then begin one or more rounds of habeas corpus proceedings. Such a course of action would lengthen the extradition process rather than shorten it. Therefore, subsection (c) deprives any court of jurisdiction to review a finding that a fugitive is extraditable under this chapter unless the fugitive has exhausted the appellate remedies available to him by right in this section. It also forecloses an appeal, a petition for habeas corpus, or declaratory judgment action if the validity of the fugitive's commitment for extradition has been ruled upon in prior proceedings, unless grounds are offered which could not have been presented previously.

The resolution of challenges to judicial action in international extradition cases must be especially prompt for several reasons. Extradition cases are quasi-criminal in nature. Moreover, in such cases our government's timely and ungruding execution of its solemn treaty obligations to a friendly national is in question.[80] Therefore, this section requires that courts of appeal decide cases arising under this chapter expeditiously.

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[76] The automatic stay of extradition expires when the court of appeals issues its mandate in the matter. Thus, the automatic stay would not ordinarily protect a fugitive seeking further, discretionary review, such as an applicant for a writ of certiorari from the Supreme Court. Of course, the fugitive whose case merits further review is free to request that either the court of appeals or the Supreme Court exercise its discretion by staying surrender while certiorari or other relief is considered.

[77] In fact, 18 U.S.C. 3184 specifically provides that a person found extraditable must be committed "to the proper jail, there to remain until . . . surrender shall be made".

[78] See *supra* notes 23 and 24, and accompanying text.

[79] *Jimenez* v. *Aristequieta,* 314 F.2d 649 (5th Cir. 1963).

[80] *Magisano* v. *Locke,* 545 F.2d 1228, 1230 (9th Cir. 1976).

Section 3196—Surrender of a person to a foreign state

Present Federal Law

Under 18 U.S.C. 3186, the Secretary of State may order that any person found extraditable by a court under 18 U.S.C. 3184 be delivered to an authorized agent of the government seeking extradition. Although it is generally agreed that the Secretary's decision in this matter is discretionary,[81] present law provides no indication of the parameters of the Secretary's discretion.

18 U.S.C. 3188 states that if a fugitive found extraditable under 18 U.S.C. 3184 is not removed from the United States within "two calendar months" of the court's commitment order, he may be released from custody unless there is "sufficient cause" why release should not be ordered.[82] The courts have held that if the fugitive institutes litigation challenging his extradition, the two-month period commences when the claims are finally adjudicated rather than when the commitment order was issued.[83]

Provisions of Section 3196

Subsection (a) carries forward the essence of 18 U.S.C. 3186 by providing that the Secretary of State shall make the final decision as to extradition. the subsection requires that the Secretary's decision be made in accordance with the chapter and the applicable treaty, and lists the actions that the Secretary may take.

Subsection (a)(1) simply permits the Secretary to order the surrender of a person the court has found to be extraditable to a duly appointed agent of the foreign state.

Subsection (a)(2) permits the Secretary to condition the surrender of a fugitive upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice or to effectuate the purposes of the treaty. This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns [84] or questions concerning trial procedures in the requesting state exist.[85] It would also permit the imposition of restrictions expressly contemplated in the provisions of some newer treaties.[86]

As noted, most extradition treaties preclude extradition for an offense of a political character, and many treaties also bar extradition where the request is motivated by political considerations. Subsection (a)(3) supecifies that the Secretary of State may deny extradition where he concludes that a treaty clause of this kind is applicable. The subsection is designed to give the Secretary of State the same broad discretion in addressing this issue which he possesses in determining whether to extend political asylum to refugees. The Secretary's decision in this matter, which frequently involves a question of foreign policy, is discretionary and will not be reviewable by the courts.

The subsection also provides that any evidence or arguments the fugitive wishes to present shall be in writing. The Secretary is not obliged to provide a formal hearing for a fugitive who claims the benefit of the "political offense" exception,[87] but it is expected that the Secretary will utilize the resources of the State Department for gathering evidence and assessing the fugitive's claim.

Subsection (a) expressly authorizes surrender of United States nationals unless surrender is expressly prohibited by the applicable treaty.[88] This subsection is necessary in light of *Valentine,*[89] in which the Supreme Court held that language contained in many of the older extradition treaties to which the United States is a party does not permit the surrender of United States citizens absent explicit statutory authority for such surrender. The result of the *Neidecker* decision has been to effectively immunize United States citizens from extradition in many cases—a result never intended by the negotiators of the treaties involved. It is the policy of the United States to treat its citizens and aliens within its borders equally in extradition matters,[90] and this subsection permits that policy to operate effectively.

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[81] See, generally, Note, *Executive Discretion in Extradition,* 62 Columbia Law Review 1313 (1962).

[82] In re Factor's Extradition, 75 F.2d 10 (7th Cir. 1934); In re Normano, 7 F. Supp. 329 (D. Mass. 1934); 6 Whiteman, *supra* note 3, 1t 1064–69.

[83] *Jimenez* v. *United States District Court for the Southern District of Florida,* 84 S. Ct. 14, 11 L. Ed. 2nd 30 (1963); *Barrett* v. *United States,* 590 F.2d 624 (6th Cir. 1978).

[84] See, e.g., *Peroff* v. *Hylton,* 542 F.2d 1247, 1249 (4th Cir. 1976), cert. denied 429 U.S. 1062 (1977); *Sindona* v. *Grant, supra* note 43, at 199, 207; see Note, Columbia Law Review, *supra* note 81.

[85] For example, the Department of State has frequently conditioned surrender of a fugitive convicted in absentia upon a promise by the foreign country involved to permit a retrial. See, 6, Whiteman, *supra,* note 3, at 1051, 1117–1122.

[86] For example, some treaties permit the requested state to condition extradition upon satisfactory assurances that the death penalty will not be imposed. See e.g., Art. 6, Extradition Treaty, Canada-United States, signed December 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976).

[87] *Peroff* v. *Hylton,* 563 F.2d 1099, 1102–1103 (4th Cir. 1977).

[88] At present, no extradition treaty to which the United States is a party expressly prohibits surrender of citizens of the requested state.

[89] 299 U.S. 5 (1936), *supra* note 32.

Subsection (b) requires that the Secretary of State notify all interested parties of his decision on extradition.

Subsection (c)(1) provides that the fugitive shall be released from custody if the Secretary of State does not order, or declines to order, the person's surrender within forty-five days after receiving the record of proceedings from the court. Of course, if the Secretary of State decides within forty-five days to refuse to order extradition, the authority for holding the person sought in custody under section 3214(e)(1) immediately expires, and the person should be released from detention at once.

Subsection (c)(2) is based on the provisions of 18 U.S.C. 3188, and provides that when the Secretary of State has ordered a person extradited,the foreign country involved must take custody of the person and remove him from the United States within 30 days. This 30-day time period does not begin until all litigation challenging extradition has been completed. The subsection expressly excludes from consideration the time during which surrender has been stayed pending litigation.

Subsection (c) requires a person found extraditable to give the Secretary of State reasonable notice that he will seek release because of expiration of a time limitation set forth in subsection (c)(1) or (c)(2), and forbids release if good cause is shown for the delay in effecting surrender.

Section 3197—Receipt of a person from a foreign state

Present Federal Law

18 U.S.C. 3192 authorizes the President to "take all necessary measures for the transportation and safekeeping" of a person extradited to the United States from a foreign country. At one time the President relied upon this statute to issue a warrant designating an agent to receive custody of a fugitive from a foreign government. 18 U.S.C. 3193 authorizes such an agent to convey the fugitive directly to the place of trial, and grants to the agent "all the powers of a Marshal of the United States, in the several Federal districts through which it may be necessary for him to pass with [the] prisoner . . . ". The authority to issue warrants appoint agents under these sections has now been delegated to the Secretary of State.[91] However, the Department of State wishes to transfer to the Department of Justice the authority to appoint agents and issue warrants in these matters.

Provisions of Section 3197

Section 3217 of the proposed subchapter carries forward the provisions of 18 U.S.C. 3192 and 3193, with minor modifications reflecting present United States practice.

Subsection (a) authorizes the Attorney General to designate an agent to receive custody of a fugitive surrendered by a foreign government, and permits the agent to convey the fugitive to the place of trial in the United States. The final sentence of the subsection permits the extradited fugitive to be taken directly to the Federal district or State jurisdiction in which charges are outstanding, without removal proceedings under Rule 40 of the Federal Rules of Criminal Procedure or interstate rendition proceedings.

Section 3217(b) is new, and is designed to implement provisions found in some of the most recent United States extradition treaties. The laws in many foreign countries require that extradition be postponed until the person has satisfied any outstanding criminal charges in that country.[92] Frequently, a person sought by the United States has already been tried and convicted of other charges in the requested country and has a sentence to serve there. If the sentence abroad is a long one, the postponement of surrender could compromise the possibility of a speedy and fair trial in this country.[93] Some extradition treaties contain provisions which deal with this problem by permitting "temporary extradition". Under these treaty provisions, a fugitive convicted abroad would be surrendered to the United States solely for the purpose of trial and sentencing here, then returned to the foreign country involved to finish the sentence previously imposed there.[94] This process balances our government's interest in adjudicating the charges while the evidence is fresh with the foreign country's desire to fully enforce its laws. It also works to a fugitive's benefit by enabling him to answer the charges in this country while evidence for his defense is still available, and by creating the possibility that the sentence imposed upon conviction in this country could run concurrently with that the fugitive must serve abroad.

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[90] Many foreign countries do not extradite their citizens because those countries can instead prosecute and punish their citizens for crimes committed in another country. As a general rule, the United States has no such ability. *Escobedo and Castillo* v. *Forsch*, 623 F.2d 1098 (5th Cir. 1980); 6 Whiteman, *supra* note 3, at 876-878.

[91] Executive Order 11517, 35 Fed Reg. 4937 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News, at 6232.

[92] See, e.g., Extradition Act, R.S.C. 1952, c. 322 (Canada); s. 24, Ley de Extradicion (Dec. 29, 1975), Art. 11 (Mexico).

Section 3197(b) provides implementing legislation for treaty provisions of this type. It provides that when a foreign state has delivered a person to the United States on the condition that the person be returned at the conclusion of the criminal trial or sentencing, the Bureau of Prisons shall keep the person in custody until the judicial proceedings are concluded, and thereafter surrender the person to a duly appointed agent of the foreign country. It also provides that the return to the foreign state of the person is not subject to the requirements of the chapter, such as an extradition hearing or an order of surrender by the Secretary of State.

Section 3198—General provisions for chapter 210

In General

This section contains the definitions and general provisions applicable to the extradition chapter.

Present Federal Law

18 U.S.C. 3198 requires that the foreign government which sought extradition pay all costs and fees resulting from the request. The costs resulting from extradition requests here frequently are so small that it is uneconomical—and diplomatically embarrassing—to attempt to enforce this statute. Moreover, many of the extradition treaties to which the United States is a party contain provisions which modify this statutory rule.[95] Also, the United States has entered into informal arrangements with some countries whereby each country bears most of the cost of the other's extradition request. In short, the present statute does not adequately reflect government policy in extradition matters.

Present statutory law offers no guidance as to who must pay the costs associated with United States requests to foreign countries for the extradition of fugitives. The Department of State requests extradition on behalf of either the State within the United States in which the fugitive is charged, or, if Federal charges are involved, on behalf of the United States. Therefore, the long-standing policy of the Department of State has been that the State jurisdiction which sought the fugitive's return must pay any expenses incurred in connection with the extradition request, and the Department of Justice must pay the expenses incurred in obtaining the extradition of a fugitive Federal offender.

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[93] *United States* v. *Rowbotham,*430 F. Supp. 1254 (D. Mass. 1977); *United States* v. *Dolack,* 484 F.2d 527 (7th Cir. 1973).

It is well to remember that both the prosecution and the defense suffer when a criminal trial is delayed too long. Indeed, as the Court of Appeals trenchantly remarked in *United States* v. *Judice,* 457 F.2d 418, 418 (5th Cir. 1972): . . . all practiced trial lawyers are well aware that attrition from . . . delay is more damaging to the prosecutor's case then to that of the defense. This will be so as long as the prosecution has the burden of proof.

[94] Cf. 6 Whiteman, *supra* note 3, at 1052-1053.

[95] For example, Art. 21, Extradition Treaty, United States-Mexico, signed May 4, 1978, —— U.S.T. ——, T.I.A.S. 9656 (entered into force January 25, 1980) requires that the requested state bear all of the expenses of extradition except those incurred for the translation of the documents or the transportation of the fugitive.

Extradition treaties are considered self-executing, BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 30-31 (1976), and supercede the provisions of prior inconsistent federal legislation, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 141, Comment (b) at 433 (1965). Therefore, whether 18 U.S.C. 3195 or a differing treaty provision is applicable in a particular extradition case depends on when the treaty entered into force.

Provisions of Section 3198

Subsection (a) of section 3198 sets forth definitions for the terms "court", "foreign state", "treaty", and "warrant".

Subsection (b) states that in general a foreign state which has requested the extradition of a fugitive located in the United States must bear all costs and expenses incurred in connection with that request. Since many of the extradition treaties contain provisions specifically dealing with costs in extradition matters, the subsection authorizes the Secretary of State to direct that this matter be handled in accordance with terms of the applicable treaty or agreement. Subsection (b) also requires that all costs and expenses incurred in connection with the execution of a request by a State of the United States for the return of a fugitive located in another country must be paid by that State. When the request for extradition is made to secure the return of a fugitive wanted for a Federal offense, the expenses must be borne by the United States. It is anticipated that when the fugitive involved is sought for both Federal and State offenses, the costs incurred abroad will be allocated accordingly.

[Text of S. 1940 follows:]

97TH CONGRESS
1ST SESSION

S. 1940

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 11 (legislative day, NOVEMBER 30), 1981

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 209 of title 18, United States Code, relating to extradition, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Extradition Act of 1981".

SEC. 2. Chapter 209 of title 18, United States Code, is amended as follows:

(a) Section 3181 is deleted.

(b) Section 3182 is redesignated as section "3181".

(c) Section 3183 is redesignated as section "3182" and is amended by striking out "or the Panama Canal Zone" in the first sentence.

(d) A new section 3183 is added as follows:

"§ 3183. Payment of fees and costs

"All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.".

(e) Sections 3184 through 3195 are deleted.

(f) The chapter heading and section analysis are amended to read as follows:

"CHAPTER 209—INTERSTATE RENDITION

"3181. Fugitives from State or Territory to State, District, or Territory.
"3182. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of the United States.
"3183. Payment of fees and costs.".

SEC. 3. A new chapter 210 of title 18 of the United States Code is added as follows:

"CHAPTER 210—INTERNATIONAL EXTRADITION

"Sec.
"3191. Extradition authority in general.
"3192. Initial procedure.
"3193. Waiver of extradition hearing and consent to removal.
"3194. Extradition hearing.
"3195. Appeal.
"3196. Surrender of a person to a foreign state.
"3197. Receipt of a person from a foreign state.
"3198. General provisions for chapter.

"§ 3191. Extradition authority in general

"The United States may extradite a person to a foreign state pursuant to this chapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3192. Initial procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) if not accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court;

the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"§ 3193. Waiver of extradition hearing and consent to removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3194. Extradition hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable, unless the hearing is waived pursuant to section 3193. The purpose of the hearing is limited. The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions. The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) A deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and "(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense had been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) CERTIFICATION OF FINDINGS TO THE SECRETARY OF STATE.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3195. Appeal

"(a) IN GENERAL.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) DETENTION OR RELEASE PENDING APPEAL.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it may order that the person be released pending determination of an appeal unless the Attorney General establishes to the court's satisfaction that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court, and, if so, shall specify the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3196. Surrender of a person to a foreign state

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

"(1) may order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) may order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) shall decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States. A decision of the Secretary of State under paragraph (1), (2), or (3) is final and is not subject to judicial review.

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3197. Receipt of a person from a foreign state

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be returned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this chapter.

"§ 3198. General provisions for chapter

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'court' means

"(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(2) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(3) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters;. and vessels or aircraft registered in the state;

"(4) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

"(5) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.".

SEC. 4. This Act shall take effect on the first day of the first month after enactment, and shall be applicable to extradition and rendition proceedings commenced thereafter.

WRITTEN STATEMENT OF ABDEEN M. JABARA, ESQ.

Mr. Chairman, members of the committee, I am pleased to have this opportunity to testify in writing on the proposed "Extradition Act of 1981" (S. 1639) and to express serious and considered opposition to its passage as it is currently drafted.

My name is Abdeen M. Jabara, and I am a lawyer and senior partner with the Detroit, Michigan law firm of Jabara, Fadel, Harroun, Samaan and Mashni, where I have a civil rights practice. Since 1979 I have been chief counsel in the legal defense team of a major international case of extradition and, as such, have had an opportunity to observe and participate at first hand in the workings of United States extradition law and procedure. I am testifying today as a private citizen who is concerned that any revision of United States extradition law, such as that contemplated by S. 1639, incorporate our traditional respect for freedom, democratic institutions, constitutional safeguards, and promotion of human rights.

The proposed Extradition Act of 1981 would make major changes in current law and substantially affect legally enshrined principles of civil rights and human liberties. These changes would mean the elimination of protection which have developed over a period of history in which the development of the specific modalities of extradition law has enjoyed careful judicial, executive and legislative scrutiny.

I am particularly disturbed by the change which S. 1639 seeks to effect relative to the federal courts' jurisdiction in the determination as to what constitutes a non-extraditable "offense of a political character" under the terms of the more than seventy five bilateral extradition treaties to which the United States is a party. S. 1639 would radically alter a historic development of removing from the executive branch of government (the King in the monarchies of medieval times) and placing in the hands of an independent judiciary the development of judicially ascertainable, applicable and binding tests to determine whether or not a particular offense upon which extradition is sought is of a "political character" or not. By removing this question from the competency of federal court jurisdiction and placing it within the discretion of the Secretary of State, S. 1639 would unduly politicize the very determination of what is an "offense of a political character" and thereby deprive persons in the United States, U.S. citizens and non-nationals alike, of fundamental constitutional rights. Arguments are consistently made before this Committee (See Statement of William M. Hannay) and in several recent federal cases (*United States* v. *Mackin,* USCA, 2nd Circuit, Docket Nos. 81-1324, 81-3064; *Ziyad Abu Eain* v. *Peter Wilkes,* USCA, 7th Cir. No. 80-1487 (1981)) that the judiciary is not equipped to deal with such issues, that what is an offense of a political character requires expertise in matters of foreign conflicts and sensitivity to diplomatic considerations that the judiciary neither has nor can acquire. The Court of Appeals opinion in *Abu Eain, supra,* at p. 14, wrote, rejecting the argument of the Executive Branch that the question of political offense was solely one for the Executive, that:

"The government does not direct our attention to a specific constitutional provision that could be invoked to guide a resolution of this issue which, the government says, does not lend itself to judicial application. See L. Tribe, American Constitutional Law 75 (1978) (hereinafter referred to as 'Tribe'). Instead, the government emphasizes the constitutional commitment of foreign policy and international affairs decisions generally to the Executive, and suggests that the political nature of those areas renders them unsuitable for judicial consideration. But, as the Supreme Court has said, 'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence.'" *Baker* v. *Carr,* 369 U.S. 186, 211 (1962).

And further, at page 15

"The government stresses the unique resources available to the Executive to aid its determination of the political situation in foreign lands. But the State Department can and has made it a practice to share that information with courts during extradition proceedings. In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil at the site and time of an individual's alleged illegal activities. The existence of a violent political distrubance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not. The resources to make that initial determination can ordinarily be sufficiently produced for judicial consideration."

And then at pp. 17-19

"The government's concerns seem directed to whether the Judiciary will recognize a given sort of violence as falling within the protection of the political offense exception, thus implicitly conferring on certain actions a status with which the Executive might disagree. We point out that the Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable "political question." To some extent, "all constitutional interpretations have political consequences," R. Jackson, the Supreme Court in the American System 56 (1955), and indeed the same follows from any treaty interpretation. We recognize the need for special sensitivity in areas such as our government's foreign relations conduct, but that sensitivity does not preclude the Judiciary from having a part in the process of determining whether the political offense exception applies. That determination involves an approach to factfinding that is traditional to the courts.

"We also disagree with the government's argument that there are no judicially discoverable and manageable standards to guide the court's discretion. For better or worse, the extradition statute requires the magistrate to determine that the crime alleged is listed in the applicable treaty, and that the provision of the treaty relating to political offenses does or does not apply. Before an act may constitute a political offense, there must be two basic determinations made by the magistrate that there was a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance. The magistrate's legal determination that a person is extraditable does not bind or control the Secretary's later political conclusion. In re *Ezeta,* 62 F. 972 (N.D. Cal. 1894). On the other hand, if the magistrate concludes that the individual is not extraditable, it is up to the Secretary to decide whether or not to pursue the issue before another magistrate, as in In re *Gonzalez*, 217 F. Supp. 717 (S.D. N.Y. 1963). The Secretary, it appears, contrary to general practice, has been permitted to shop for a more receptive magistrate.

"In order to assure that there is adequate protection of the rights of an individual whose extradition is requested, '(p)urely as a practical matter it would seem reasonable for the courts of this country to make an initial finding of extraditability of particular offenses.' *Shapiro* v. *Ferrandina,* 478 F2d 894, 906 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973). As Judge Friendly stated in the *Shapiro* case, 'we see little reason why a prior judicial determination would be viewed by (the Secretary of State) an unwarranted intrusion upon executive power.' Ibid. See Sharpf, Judicial Review and the Political Question: A Functional Analysis, 75 Yale L.J. 517, 584 (1966) (courts are cautious about invoking political question doctrine where important individual rights are at stake)."

If anything, in order to advance the cause of individual rights, S. 1639 should be amended to (1) place solely within the jurisdiction of the Courts the determination of what is a non-extraditable "offense of a political character", (2) remove it from the discretionary powers of the Secretary of State, as is presently provided and, (3) lastly, prohibit the Secretary from "shopping" for a more understanding Magistrate when one rules that the offense charged is a non-extraditable offense of a political character, as the Secretary is presently doing in the *Mackin* case, *supra.*

Moreover, while the Courts can and should look to the State Department for expertise on the *facts* of a given foreign conflict, as was done in *Mackin,* with the testimony of Mr. Frank Perez, the testimony of the State Department on ultimate legal issues, as opposed to facts, can be highly prejudicial of individual rights and elemental due process of law. In *Abu Eain,* for instance, a representative of the State Department, Mr. Lewis Fields, Jr. was allowed to testify on the State Department's view as to an ultimate legal issue before the Court which was solely determinable by a judicially evolved test. One legal writer has concluded that the Fields testimony in *Abu Eain* influenced the Magistrate to posit a test which was *not* based on previous judicial precedent, thus depriving *Abu Eain* of the benefit of the traditional "political incidence" test. (See Terrorist Extradition and the Political Offense Exception: An Administrative Solution, Virginia Journal of International Law, Vol. 21, No. 1, Fall 1980 p. 175.)

With regard to the bail provision of the draft bill, this writer would urge the Committee to bring the standards for release on bail in line with the standards developed in criminal cases in the United States. Appeals can take years and under the current practice and S. 1639 retention of "special circumstances" standard an individual may be incarcerated for a protracted period even though they have not been charged with the commission of any offense against the laws of the United States. It would appear to be most unjust to subject persons whose extradition is requested to more stringent bail standards than exist for even persons charged with violation of the criminal laws of the United States, even those with felony records.

Lastly, to the extent that the Secretary of State will be provided with a role in the denying or granting of extradition, such a role must not have statutorily unfettered discretion. Subsection (a) of Section 3196 only limits the Secretary's discretion by the provisions of the chapter and the applicable treaty. Subsection (a)(1) simply permits the Secretary to order surrender of a person the Court has found to be extraditable or, under Subsection (a)(2) the Secretary *may* condition the surrender of a person upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice. The commentary on the provision contained in the Memorandum on Extradition Legislation published in the Congressional Record on September 18, 1981 states:

"This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns or questions concerning trial procedures in the requesting state exist."

The difficulty with this subsection is that (1) it does not impose any affirmative duties on the Secretary where a country with whom the U.S. has a bi-lateral treaty for extradition is a consistent and gross violator of internationally recognized human rights or where a claim that the individual's human rights would be violated were he to be extradited for trial, and (2) it does not establish any procedure of fact finding with regard to fair trial or human rights issues before the Secretary but merely allows the Secretary to make what might be diplomatically astute decisions but ones which are violative of the Constitutional prohibition of subjecting anyone to cruel and unusual punishment or a denial of due process of law. Therefore, where a claim is made by an individual to the Secretary that he or she would be denied a fair trial or that his or her fundamental human rights and liberties would be violated by the requesting state, that individual should be provided with access to *all* the information which the Secretary has available to him on these issues and should be allowed to make a fact presentation on these issues. This is all the more compelling where, as in the *Abu Eain* case, the respondant's attempts to introduce evidence on human rights issues such as methods used by the requesting state in the obtaining of in-custody inculpatory statements, and fair trial, were continuously rejected and discovery relative to the requesting state's evidence was continuously denied.

Again, I wish to extend my deep appreciation for this opportunity to appear before this Committee and offer this testimony for the record. It is my small hope that these views will merit the attention of the members of the Committee before they act on a matter that so seriously affects how millions of people around the globe perceive our judicial system and form of government, so seriously effects human liberty and civil rights, and impacts upon our international relations.

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